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QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, IN ANY PART OF THE WORLD, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES

Sale of children

Report submitted by Mr. Vitit Muntarbhorn,
Special Rapporteur appointed in accordance
with resolution 1990/68 of the Commission
on Human Rights

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Introduction

1. At its forty-first session, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities adopted resolution 1989/42, entitled "Sale of children", by which it referred to the Commission on Human Rights for its attention, action or consideration, draft resolution XII.

2. At its forty-sixth session, the Commission on Human Rights adopted draft resolution XII recommended by the Sub-Commission for adoption by the Commission (resolution 1990/68). By this resolution, the Commission on Human Rights:

> "1. Decides to appoint for a period of one year a Special Rapporteur to consider matters relating to the sale of children, child prostitution and child pornography, including the problem of the adoption of children for commercial purposes;
>
> 2. Requests the Chairman of the Commission, following consultations with the other members of the Bureau, to appoint as Special Rapporteur a person of international reputation;
>
> 3. Invites the Special Rapporteur to take account, in fulfilling his mandate, of the need to be in a position to use any credible and reliable information made available to him, to request the Governments concerned to state their views and comment on any information he intends to include in his report and to carry out his task with discretion and independence;
>
> 4. Requests the Secretary-General to urge all Governments to co-operate closely with the Special Rapporteur and to offer their co-operation and assistance so that he may fulfil his mandate effectively;
>
> ...
>
> 6. Requests the Special Rapporteur to submit a comprehensive report to the Commission at its forty-seventh session on his activities relating to these matters, including the frequency and extent of such practices, as well as his conclusions and recommendations."

3. The Economic and Social Council endorsed Commission resolution 1990/68 by decision 1990/240 in which it also extended the period of the mandate of the Special Rapporteur to two years.

4. Pursuant to the above-mentioned resolution and decision, the Chairperson of the forty-sixth session of the Commission on Human Rights, after consultation with the members of the Bureau, appointed, on 10 September 1990, Mr. Vitit Muntarbhorn (Thailand) as Special Rapporteur.

5. On 14 November 1990, the Secretary-General sent a note verbale to all Governments and with reference to Commission resolution 1990/68 enclosed a letter by the Special Rapporteur in which he asked for assistance in the performance of his mandate as well as for pertinent information. A similar request was addressed to non-governmental organizations. In addition, the

Special Rapporteur has established contact with the members of the Sub-Commission and in particular the Chairman of the Working Group on Contemporary Forms of Slavery as well as with relevant specialized agencies.

6. Given the short period of time which has elapsed since his appointment this report aims to provide a preliminary assessment of some of the key problems and prospects concerning the topic. It is not intended to be a detailed report, as the latter is not due until the end of 1991. It is hoped, however, that the observations made in the present report will raise comments and invite responses and assistance which will ultimately contribute to the preparation of the next report.

I. CONSIDERATIONS OF A GENERAL NATURE

7. The sale of children is a universal phenomenon, although the extent varies from country to country. Its transnationalism has been aggravated by the advent of unabashed consumerism, modern technology and rapid communications. Child exploitation is tragically not merely the "business" of certain individuals; there is also an international system based upon criminal elements which profiteers therefrom. Ironically, it is not only the problem of the child whose life and integrity are at stake; it is equally the problem of the parents and the family whose needs give rise to the abuses committed against the child. The strategies required to combat this issue thus need to be multi-faceted and comprehensive.

8. Perhaps the first challenge to be noted is that of definition. The word "child" itself gives rise to different age criteria in national systems. At the international level, the 1990 United Nations Convention on the Rights of the Child takes as the threshold the age of 18; by article 1 it is stated that "a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier". However, particularly in regard to the issue of child labour, the Convention does not stipulate 18 as the minimum age for employment, and a cross reference is necessary to the international standard established by the International Labour Organisation (ILO) to identify the age concerned. By ILO Convention No. 138, the minimum age is 15, with possible reduction to 14 in developing countries. At the national level, especially in countries which have not acceded to this Convention, the age range is not uniform. This is but one of the many examples concerning the leeway surrounding the age criterion.

9. Equally taxing is the notion of "sale". Anyone who has studied law in the major legal systems of the world can probably identify differences in approach concerning the rise and fall of commercial contracts. Contractual obligations arise differently in common law and civil law systems. The difficulty is further highlighted by the question posed by a non-governmental organization as to whether the sale merely concerns a child sold by one person to another (the buyer) like a consumer article or whether it also covers: (a) a child transferred to another person in exchange for a sum of money or other considerations which do not constitute the price of the child but which nevertheless represent unjustified profits (e.g. bribes); (b) where the child is rented to another person, for example, for the purpose of sexual exploitation or exploitation of his labour when the sum paid is completely disproportionate to the work the child has to do; (c) the situation in which a child is held till the parent or guardian is in a position to meet a financial obligation (see E/CN.4/Sub.2/AC.2/1989/8/Add.1, page 2).

10. In the opinion of this author, we should not be too legalistic in analysing what constitutes a sale. The key is the exploitation of the child, which usually entails the action of another benefiting from the child in violation of his/her rights.

11. What exemplifies the sale of children? Here again there is room for divergence of interpretation. According to one United Nations document, there is a reference to three situations: the sale for adoption; the sale for forced labour; and the sale for prostitution (E/CN.4/Sub.2/1987/28, page 6). Another non-governmental organization (International Abolitionist Federation, Report to the Working Group on Slavery, 1989, page 2) takes a

broader perspective by identifying the following: (a) the sale of children for adoption and marriage; (b) the sale of children for prostitution and sex exploitation; (c) the sale of children for pornography; (d) the sale of children for cheap and bonded labour; (e) the sale for begging, stealing and other criminal actions; (f) the sale of children for organ transplantation.

12. At the international seminar on child labour and trafficking and the sale of children held in Siracusa in September 1990 (organized by Defence for Children International (DCI) and the International Commission of Jurists (ICJ)), the working group on trafficking and sale of children concentrated mainly on inter-country adoptions, while that on child labour identified twelve categories of child labour, namely: armed conflicts; adult criminal activities; forced labour of abducted children; debt bondage; labour in the unorganized sector; labour in the organized sector; child prostitution, pornography and sexual exploitation; forced marriages; disabled children in the labour force; domestic labour; apprenticeships; and family supervised labour.

13. Clearly there is room for a broad or narrow interpretation of the notion. Moreover, while there is substantial overlap between the "sale of children", "child prostitution" and "child pornography", the first element is wider and may cover more categories, e.g. adoption and the trade in organs.

14. The task of the Special Rapporteur is somewhat daunting in that in view of the limited time available to do the basic research, it will not be possible to cover all the examples cited in detail in the projected report. Tentatively, it is suggested that the report concentrate on the question of adoption, aspects of child labour (particularly bonded labour), child prostitution and child pornography, and organ transplantation (in view of the recent World Health Organization (WHO) initiative on this issue). The perspectives would have to vary from the national to multilateral levels, and would complement article 35 of the Convention on the Rights of the Child in its stipulation that "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."

II. SALE OF CHILDREN

A. Adoption

15. Many municipal systems have catered to the adoption of children for decades so as to facilitate the transfer of children from their biological parents to the adoptive parents. Traditionally, this was one method of finding a substitute home for the child where the original parents were unable or unwilling to care for the child. However, particularly from the 1950s when the adoption of war orphans from Asia became popular, there arose the threat of commercialism between different countries, particularly the flow of children from Asia and South America to Europe and North America. As the report of the Siracusa seminar observes:

> "All this has led to a structural 'demand' for children in the industrialized world and an equally structural 'supply' of children in the developing countries, and to the search for candidates for adoption from the developing world. To a certain extent, the field has become commercialized, lending itself to various abuses. Adoption agencies linked with the business sector in some countries have mushroomed with the sole aim of faciliating inter-country adoption based upon programmes for cash purpose. They tend to neglect the root causes of the adoption itself which may arise from poverty and abandonment in the country of origin; they may merely service the demand factor in the adoptive country.
>
> ...
>
> What is new is the link between trafficking and sale with the practice of adoption of children in their own countries, and above all, in inter-country adoption. The channels for inter-country adoption are at times clandestine and illegal. There is also a grey area where a seemingly legal entry of a child into a country where the child is adopted is obscured by malpractices or dubious practices in the country of origin. This is aggravated by independent or private adoptions whereby prospective adoptive parents bypass officially recognized authorities and act through their own means." (report of the International Seminar on the Implementation of the Convention on the Rights of the Child With Special Reference to the Exploitation of Child Labour, Bonded Labour and Trafficking and Sale of Children, 1990, DCI/ICJ, pages 15 to 16).

16. Precisely because of the possibility of abuse, safeguards are required to protect the child. The exhortation is provided by article 21 of the Convention on the Rights of the Child, requiring authorization of adoption by competent authorities, exploration of adoption in the home country before inter-country adoption ("subsidiarity"), and action against "improper financial gain". Moreover, measures concerning the root causes, such as poverty affecting the original parents, need attention. These factors parallel the work of the Hague Conference on Private International Law which is now drafting a new international convention on inter-country adoptions.

B. Child labour

17. There is much literature on the question of child labour, particularly through the efforts of the ILO, Governments and non-governmental organizations. The phenomenon is vast, and there is a continual conflict concerning the "guesstimates" of the numbers involved. The United Nations has been assisted by a seminal report by A. Boudhiba on the exploitation of child labour submitted in 1982 (E/CN.4/Sub.2/479).

18. As noted above, the categories of child labour are numerous, and one of the tasks of the report to be submitted at the end of 1991 will be to undertake the challenge of analysis realistically.

19. An evident shortcoming in this field is the ubiquitous presence of legislation, especially the presumption that laws per se will eradicate the exploitation of child labour. A host of laws exist both at the international and national levels, fluctuating between the need to abolish child labour and the need to regulate it. Both approaches have been hampered by the fact that law enforcement is poor, while the exploitative situations usually take place in the informal sector which is relatively invisible and beyond the law. As observed by an ILO publication:

> "The legal approach has proved to be inadequate to the problems of South America, and in recent years it has been rendered almost impotent in the face of massive poverty. Some have even questioned how rigorously the law should be enforced; in the absence of full employment, realistic minimum wages and adequate social welfare programmes the prohibition of child work might serve only to augment the misery of many millions of families." (A. Bequele and J. Boyden (eds.), Combating Child Labour, ILO, 1988, page 125).

20. While one can sympathize with that point of view, the law is necessary in this field. However, it should not be posited in a vacuum; it requires a whole variety of social, economic, political and budgetary interventions to bolster the law as a means to an end and not an end in itself.

21. Until now this has proved to be an underlying weakness; the interventions have been almost too little and too late. Does it suffice to stipulate a minimum age for child labour when the family is pushing the child out to work? What social welfare or subsidy is there for the parents to avoid sending the child to work and to encourage him/her to go to school? How attractive is schooling to the child or the parents when there is little to eat at home? One wonders also how and if the private sector has been catalysed to help exert peer group pressure on members of that sector to prevent abuses. Have links been established sufficiently with the potential abusers to prevent abuses, whether by means of "carrots" or "sticks"?

22. While virtually all systems have laws on child labour, many sytems still do not have laws providing social welfare and subsidies for the families and for the children. While the laws seek to punish transgressors, they seem to forget that incentives may also be required to orientate employers away from the use of child labour. A law "wishing away" child labour may indeed prove to be little more than wishful thinking. What is needed is an inter-disciplinary approach linking law, policies, and practices with

appropriate budgetary commitment and the relevant catalysts (families, children, employers, State organs and non-governmental organizations) for sustained interventions.

C. Organ transplantation

23. Perhaps the most insidious issue to appear on the international scene in recent years is the question of organ transplants affecting children. Are children being sold for this purpose? The rumours abound, and the denials are equally abundant. A 1990 report of the World Health Organization notes as follows:

> "A feature of organ transplantation since its commencement has been the shortage of available organs. Supply has never satisfied demand, and this has led to the continuous development in many countries of procedures and systems to increase supply. Rational argument can be made to the effect that shortage has led to the rise of commercial traffic in human organs, particularly from living donors who are unrelated to recipients. There is clear evidence of such traffic in recent years, and fears have arisen of the possibility of related traffic in human beings." (Human Organ Transplantation, ED 87/12, 19 November 1990, World Health Organization, page 4).

24. Whatever the facts of the case, it is submitted that safeguards are required to protect children from such threat. In this regard it is interesting to note that the World Health Organization has taken up the issue concretely. It is currently drafting a set of guiding principles on human organ transplantation which have direct import on children, including the following:

> "No organ should be removed from the body of a living minor for the purpose of transplantation. Exceptions may be made under national law in the case of regenerative tissues."
>
> "The human body and its parts cannot be the subject of commercial transactions. Accordingly, giving or receiving payment (including any other compensation or reward) for organs should be prohibited."
>
> "It should be prohibited for any person or facility involved in organ transplantation procedures to receive any payment that exceeds a justifiable fee for the services rendered." (Human Organ Transplantation, supra., pages 4-5).

25. Whatever the merits of these guidelines, much will depend upon the types of laws, policies and interventions at the local and transnational levels to prevent abuses and identify the culprits. Here again, if the root causes are linked with family needs and social disparities, a purely legalistic approach will not suffice, and a more comprehensive set of strategies is required.

III. CHILD PROSTITUTION

26. Child prostitution is a global phenomenon. It is particularly evident in the developing world, partly due to the pervasive deprivations which induce parents to sell their children and/or drive children into the trade. It manifests itself in a variety of forms. As identified by one commentator, (H.W.J. Breys, Report on the Sexual Exploitation of Children and Young Persons, Council of Europe, 1989, pages 12-13) it is linked with serfdom, debt bondage, forced marriages, sale of children, sex tourism and streetchildren. Children may be led into prostitution because they are "runaways, walkaways or throwaways." In the case of girl prostitutes, there may be elements of gender discrimination leading them into this profession, compounded by certain cultural practices, such as elevating girls from a young age to the status of "sex goddesses". The problem has been aggravated by sex tourism, and led to a greater number of paedophiles and of boy prostitutes. Prostitution itself is only one step away from other tragic enticements such as drugs and pornography.

27. While there may be room for debate as to whether to legalize adult prostitution, it is submitted that this is out of the question in the case of the child: children should not become prostitutes for any reason as this is detrimental to their health, and it is in breach of their rights. The advent of AIDS and the rise in the number of children affected adds another urgent call of distress.

28. There is a wide variety of national and international laws on the subject. The most recent is the Convention on the Rights of the Child whose article 34 stipulates that:

> "States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
>
> ...
>
> (b) The exploitative use of children in prostitution or other unlawful sexual practices."

29. Again the quandary is to what extent the laws are effective in preventing or remedying child prostitution. The challenge is similar to that posed in the context of child labour, of which child prostitution can be considered to be a part: the law alone prohibiting, abolishing or regulating the problem does not suffice. Other interventions of a broader nature are required not only for the girls and boys in the trade but also their families. Appropriate educational opportunities, occupational alternatives, and social subsidies are likewise needed as part of those interventions.

IV. CHILD PORNOGRAPHY

30. One commentator has defined this as comprising "any visual or audio material which uses children in a sexual context." (Report on the Sexual Exploitation of Children and Young Persons, supra., page 17). The United States customs service offers this explanation: "a visual depiction of anyone under the age of 18 engaged in explicit sexual conduct, real or simulated, or the lewd exhibition of the genitals."

31. Again while there may be some debate as to the extent to which adult pornography should be prohibited, no such margin of discretion is appropriate for child pornography: children should not become its victims, especially as the damage incurred is both physical and psychological. The setting has become more complicated due to the advance of technology and the availability of video equipment which can rapidly augment the transnational production and dissemination of pornography. From another angle, there is little information on the psychological make-up of the customers which, if proven, would influence the rehabilitation process.

32. Evidently there is a range of laws which exist to prohibit and/or control the production and sale of pornography, although they tend not to punish the mere possession thereof. The Convention on the Rights of the Child covers the issue in article 34 (c) by which States Parties undertake to prevent the exploitative use of children in pornographic performances and materials. While some countries have laws specifically on child pornography, others do not. In effect, the general provisions of the national criminal law can usually be extended to prohibit child pornography, if there is sufficient political and legal "will". Yet, there arises the question concerning the efficacy of these laws. The issue of other interventions beyond the law arises again, reflecting the perspective already expressed.

V. CAUSATION

33. One of the concerns pervading all the sections above is causation. Without identifying the root causes, how can one truly prepare a comprehensive strategy to prevent the problems from arising? There is an addititional caveat in that much of the existing legislation purports to provide remedies rather than deal with the root causes.

34. Some of the causes of child exploitation are well-known. Poverty emerges as a common thread. However, there is more to it than meets the eye. The fragmentation of the family, compounded by migration, break-up and breakdown, exerts an inordinate pressure on the children. Child abuse may arise; it is well established that many child prostitutes come from such a background. Gender discrimination is also visible, leading to disadvantages for the girl child, e.g. in the family setting where priority is accorded to boys in relation to access to schooling. This is compounded by cultural practices, such as the persistent viewpoint in some societies that children are the chattels of the parents, and the apparent social acceptance of prostitution and pornography. There is the additional elusive factor of the customer's frame of mind; if this is conditioned by a psychological hang-up, surely punitive laws alone will not suffice to change that state of mind.

35. At the other end, there are criminal elements which seek to exploit children, ranging from procurers to syndicates, from unscrupulous employers to sub-contractors, from agents to profiteers, colluding with law enforcement officials at times. There are also those consumers and customers who fail to care about how they come to enjoy their products. The vicious cycle is aggravated by passivity - close our eyes and accept the fait accompli, especially if it is going to cost a lot of money to change all that. That which is a cause may become a consequence and vice versa.

36. If such is the dialectic, have the laws, policies and interventions taken a proactive approach rather than a reactive approach? A simple question may be posed, for example. While we have laws which seek to punish procurers, have we the laws to help the needy families in terms of socio-economic support so as to prevent them from selling the children into the flesh trade, or after having sold them, to take them back and reintegrate them into the family setting? If there are laws, are there policies, programmes and budgets? Or are the authorities more concerned about servicing the national debt in the face of international financial institutions? Are they more oriented to obtaining hard currency from tourism and export of products, irrespective of child exploitation? How much community participation is there in preventing and solving these problems?

37. From another angle, when we refer to cultural practices, it is obvious that laws alone will not suffice to overcome age-old beliefs. This entails a different socialization process with greater access to education and information. It requires imaginative use of the mass media and community involvement in questioning taboos and ingrained prejudices. These elements pinpoint the premise that if we are really to prevent or cure the problems of the sale of children, the strategies have to start from identification of the root causes, admission that the problems exist, and adoption of relevant long-term, multi-pronged action with budgetary commitment to deal with them. The causes did not arise in a day and they will not disappear overnight.

VI. INTERNATIONAL SCENARIO AND NATIONAL CONTEXT

A. International scenario

38. At this juncture, it is proposed to pose three basic questions concerning the international scenario:

(a) What is the legislative framework on the issue of sale of children, child prostitution and child pornography?

(b) Is there a policy framework and a programme of action with concomitant budgetary commitment?

(c) What are the catalysts which lead to action?

39. The first question posed gives rise to a large number of international treaties and statements on the subject. The latest in line, which reflects on the sale of children including adoption for commercial purposes, child prostitution and child pornography, is the Convention on the Rights of the Child itself. This is set against a backdrop of many treaties dating from the early part of this century including the various anti-slavery conventions, the conventions against the sale and trafficking of women (including the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others), the ILO's own conventions on minimum age for child labour and forced labour, and the 1923 International Convention for the Suppression of the Circulation of and the Traffic in Obscene Publications. These are not self-contained and should be placed in the setting of all the existing human rights instruments, including, inter alia, the 1948 Universal Declaration of Human Rights, the 1966 Covenants and the various conventions concerning women's rights, including regional initiatives.

40. It is not the intention of this preliminary report to examine these in detail for lack of space and time, but one should note that the legislative framework already exists. Interestingly, one may add that many of the international laws concerned take a "stick" approach of either regulating or prohibiting practices. Moreover, they tend to be targeted to the protection of the child and punishment of the exploiter.

41. The fact that there is such framework does not imply that it is free from loopholes. The shortcomings include the antiquated nature of some of the instruments, the paucity of accessions by States, and the lack of implementation by those which have acceded. It is also tempting to deduce that they do not explore the "carrots" that may also be required to change local practices, e.g. incentives in the form of development aid and assistance, and responsive industrialization. Moreover, they do not provide an adequate preventive approach to tackle the root causes enumerated above, e.g. which conventions seek to establish the broad social interventions required to help indigent families at large?

42. On the policy-making front, there are many policy statements and there is evidently a shift now to more preventive measures. This does not simply call into play child-targeted strategies, but also development concerns affecting other lives interwoven with the children, especially the family. It requires not only political will but also social will and long-term allocation of resources.

43. One of the most recent policy statements along this line was the Declaration and Programme of Action on Child Development adopted by the Heads of State at the World Summit for the Child in September 1990. The Programme of Action sets various targets to be attained in the next decade, such as the reduction of child mortality and the assistance needed for children in difficulties. More specifically within the setting of the United Nations human rights organs, the Working Group on Slavery's own programme of action on the sale of children takes into account both preventive and remedial strategies. The responses from States are now awaited in terms of provision of information requested by that programme. UNICEF's own initiatives at both the international and national levels are increasingly directed towards children in difficulties, including those of concern to this report.

44. Although the policy framework and related action have emerged, one of the perennial questions is how to sustain the initiative and how to network between the key catalysts. This has a financial implication, on the one hand, and it raises the call for collaboration between different States and agencies, on the other. The catalysts have to be broader than the various United Nations institutions that identify themselves as human rights organs. There is a key role for the world financial institutions such as the World Bank, the International Monetary Fund and the wide array of development agencies such as the United Nations Development Programme. One should not neglect also the other agencies that interrelate with the potential exploiters of children, e.g. if it is a question of sex tourism, the World Tourist Organization is a key catalyst in preventing abuses. This is closely linked with regional and bilateral aid agencies and programmes. These may help to provide the incentives that are required to change practices.

45. On the other side, there is the need for stricter law enforcement and related sanctions. This depends much upon action to identify the culprits and apprehend them. The role of law enforcement authorities, particularly INTERPOL, is important at the international level. INTERPOL now has a model crime prevention programme which has a bearing on child exploitation. It is also circulating a questionnaire to States to identify facts and figures on offences committed against minors. At the regional and bilateral levels, there is also much to be done. Interestingly, a recent bilateral initiative in Asia is the exhange of lists of paedophiles between countries so as to identify those who have been deported for malpractices against children.

46. The untiring work of the non-governmental organizations at the international level should be recognized as a key counterpart in all the matters mentioned. It is often through their initiatives that the United Nations system and States have taken up programmes and action, and it is through their monitoring that the pace for change is accelerated.

B. National context

47. The national context may also be tested by the yardsticks set by the three questions below:

(a) What is the legislative framework on the issue of sale of children, child prostitution and child pornography?

(b) Is there a policy framework and a programme of action with concomitant budgetary commitment?

(c) What are the catalysts which lead to action?

48. The first question gives rise to a self-evident reality: there are already many laws at the national level dealing with the issue concerned. However, they often suffer from poor law enforcement, such as insufficiency of labour inspectors and ineffective police. The laws tend to take a remedial approach rather than prevention (in terms of social subsidies to prevent the breakdown of families). They attempt to apply sanctions, but fail to explore sufficiently the question of incentives for change. Particularly in federal States, there is the problem of federal laws needing the co-operation of the composite states to execute legislation at the provincial level; the message is one that has to be carried through to the local people at the micro level. Regrettably, the strategies are frequently detached from the socio-economic setting, "wishing away" centuries-old practices that will not disappear without other interventions.

49. For this reason, when viewing the legislative framework, it is imperative to identify the policies, programmes and budgets that go hand in hand with the action needed to tackle the root causes. In many developing countries, there is a national economic and social development plan usually of five to six years' duration which has direct bearing on children's rights, especially as it affects budgetary allocations. Many countries also have specific child development plans, setting aims and targets. While the "will" emerging from these plans is laudable, effective implementation through action programmes interlinked with community participation needs further attention. In several countries most closely affected by the child exploitation problem, there is still a lack of subsidies for families and an absence of a family-oriented programme with long-term budgetary support. Ironically, the money spent on arms purchases and industrialization more often than not outweighs that spent on social development, particularly child and family development.

50. There is another message linked with the issue of catalysts: precisely because the problem of child exploitation is so vast, governmental initiatives alone will never suffice. This calls into play the role of non-governmental organizations and community groups, including children's groups and the mass media, as watchdogs for children's rights. While many governmental plans recognize the importance of such entities, the realities may differ. For instance, while investment incentives in terms of tax reductions are available for industrial groups, they are much less accessible to those entities involved in "social investment" including child related work. One recent example drawn from a developing country illustrates this point: while the authorities are willing to reduce tariffs for new cars imported for use by foreign investors investing big sums of money in the industrial sector in the country, they are not willing to exempt from such a tariff a child-related non-governmental organization wishing to import second hand cars (donated as gifts by friends in other countries) for use in rural development programmes.

51. On another front, there has been little exploration of collaboration with groups which may exert peer group pressure on potential abusers of children. In the case of child labour, have the industrial sector and the trade unions been approached to scrutinize those small scale factories that tend to use

child labour? Could that sector evolve its own voluntary code of conduct to protect children and issue "child-exploitation free certificates"? In the case of adoption, the traditional adoption agencies may need to broaden their work to cover the root causes that lead to child abandonment rather than concentrate on the adoption process alone. In the shadowy area of organ transplantation, to what extent has a dialogue with medical groups and associations been established? With regard to child prostitution and pornography, consumer groups should team up to advocate consumer responsibility towards children. The mass media should be questioning themselves on those advertisements and captions which may lead to child exploitation. And while we often identify the law enforcement authorities as colluding with vested interests, have we provided the good elements with incentives, such as better pay, in order to build more effective allies?

52. The range of catalysts is not exhaustive. A key premise for exploring their roles is not simply to advocate sanctions against transgressors but also to explore incentives which can promote the work of those seeking to help children and to encourage "borderline" cases to opt for child protection instead of child abuse.

VII. CONSIDERATIONS WITH REGARD TO ACTION

53. One of the underlying threads of this study is the premise that while laws can help, they alone do not suffice. We should thus explore the whole range of resources and personnel not merely in the legislative setting but also in the other arenas. The lessons are there to be learnt from many programmes existing at the field level which can help to translate aspirations into realities in a sustained inter-disciplinary context.

54. It is also this perspective that hampers the role of the Special Rapporteur in the preparation of the final report. Currently, most of the information to which he has access is in the form of documents and written submissions, often by means of hearsay evidence. To undertake the task of assessing the situation concretely, some field visits are required to various parts of the world (preferably on a balanced geographical basis) to learn of the various strategies and action being implemented by both the governmental and non-governmental sectors. Advice and assistance on this matter are most welcome.

55. On another front, it would be useful to collect further information on the various aspects posed above by means of a questionnaire circulated widely. This may be complemented by the holding of regional consultations to update information and interchange experiences.

56. In preparing an action-oriented report, some of the tenets emerging from the survey of the information available can be identified as follows:

(a) Prevention: particularly the need for preventive action against child exploitation in the form of satisfaction of basic needs, not only for the child but also for the family, correlative development assistance, and a redistribution process to redress social deprivations and malpractices;

(b) Protection: particularly the enactment and reform of laws and related policies to protect children's rights both at the national and international levels, in addition to better identification of the culprits and law enforcement;

(c) Remedies: particularly the improvement of access to legal and other remedies, bearing in mind that the formal legal institutions, such as judges, police and lawyers, need to be complemented by quasi-legal or non-formal institutions, such as village committees and Ombudsmen, which can help to safeguard children's interests at the grassroots level;

(d) Rehabilitation: particularly the need for counselling, medical, occupational and development facilities to help rehabilitate the victims of exploitation and provide alternative forms of livelihood;

(e) Intervention: particularly the building of a corps of responsive institutions and personnel, governmental and non-governmental, to intervene on behalf of the child and the family with concomitant budgetary allocations;

(f) Participation: particularly the recognition of more popular participation in the process of protecting children, ranging from access of ordinary people to the legislative process to implementation and evaluation of programmes;

(g) Dissemination: particularly the gathering of data, the education and teaching of children's rights, and the infusion of child protection as a pervasive cultural ethic;

(h) Collaboration: particularly the maximal use of existing entities at both the national and international levels to help protect children, collaborating with not only traditional human rights organs and child-targeted institutions but also others, such as financial and development agencies, and the private sector whose operations have implications for child and family development;

(i) Alternatives: particularly the search for not only legislative sanctions and disincentives against child exploitation but also social pressure and incentives for changes of habit and cultural norms so as to build a broader horizon of allies to help children.

57. Finally, it should be noted that while this report has not delved into concrete cases and allegations of abuses, the later report to be submitted will deal with these instances. This is very much dependent upon how the evidence is gathered from both governmental and non-governmental sources and presented to the Special Rapporteur during the year. As a corollary, there is a need to build a network of contacts and an information base at both the national and international levels to assist in the compilation process. A ramification of this process is the potential emergence of a pro-active role on the part of the Special Rapporteur: an urgent action procedure, based upon past experience in the United Nations system, may be evolved to accelerate action to help those who are the victims of exploitation.

VIII. CONCLUSIONS AND RECOMMENDATIONS

58. This preliminary report has endeavoured to provide an overview of key issues concerning the sale of children, child prostitution and child pornography. Definitional difficulties have been identified, and these will affect the parameters of the work undertaken. Tentatively, it is proposed that the following be examined in greater detail in the later report projected: adoption for commercial purposes, aspects of child labour, organ transplantation, child prostitution and child pornography. These will be supplemented by case profiles and concrete examples.

59. Although it may be premature to make conclusive recommendations at this point in time, some preliminary recommendations may be proffered.

60. The scope of the more detailed report to be submitted later by the Special Rapporteur is inevitably influenced by such realities as time, resources, information and credible evidence, particularly where there are allegations of abuses.

61. There is a need to build a network of contacts at both the national and international levels in the governmental and non-governmental sectors to establish an information base which may help in the gathering of data and proof concerning the issues mentioned. At this stage, an inventory of addresses is already being undertaken, and this should be expanded continually. Suggestions are invited from all sources.

62. While stock-taking of available documents is being carried out at present by the Special Rapporteur, it is evident that although information of a general nature is available, more substantial proof should be gathered concerning concrete cases. This is contingent upon the efforts of both the governmental and non-governmental sectors, including law-enforcement agencies, linking with the United Nations Centre for Human Rights and the Special Rapporteur.

63. The root causes of the phenomenon should be better appreciated as these will condition the types of responses required. Economic disparities, social deprivations, family disintegration, unadulterated consumerism and systematic exploitation are but some of the ostensible causes. In terms of countermeasures, far more than laws and regulations are required to prevent and eliminate these factors. Political and social will, programme-linked policies, development assistance, and budgetary commitment are but some of the inter-disciplinary requisites of a long-term nature.

64. The transnational aspects of the sale of children, child prostitution and child pornography call for more identification of not only multilateral initiatives but also regional and bilateral efforts to tackle the problem. More information concerning regional and bilateral arrangements is invited from the international community.

65. On the one hand, there is a need to collect information on local laws and law enforcement influencing the issues mentioned in an analytical perspective. On the other hand, it is imperative to go beyond the legal framework to identify the action scenario based upon the plethora of

interventions required to address the problem. These are interwoven with prevention, protection, remedies, and greater participation and collaboration by all sectors of the community.

66. To reflect these concerns, a questionnaire is being prepared to bridge the information lacuna. This will be circulated among relevant agencies and personnel, and an effective response to the questionnaire would be appreciated.

67. In order to become better acquainted with the issue of the sale of children, child prostitution and child pornography at the global level, visits to various parts of the world by the Special Rapporteur may be required, preferably on a balanced geographical basis. They will broaden the basis of contacts, and provide insight into the various initiatives to prevent and eliminate the problem at the national level. As well as these visits, regional consultations may be organized to create a momentum of interest and promote better networking.

68. Although a key role on the part of the Special Rapporteur is to build an information base which can be channeled to the United Nations and other concerned entities, an urgent action procedure to propel immediate action for needy cases may be evolved as a component of the tasks envisaged, based upon past practices in the United Nations system.

69. Greater collaboration should be sought not only with child-oriented strategies and agencies but also with others which condition the fate of children. These may include, inter alia, the parents, consumers, professional associations, the private sector, community organizations, law enforcement personnel, financial institutions and individuals at both the national and international levels. Tactics to deal with the potential and actual abusers require wider targeting in terms of prevention and cure.

70. Several of the obstacles identified in this preliminary report concern not only economic but also socio-cultural problems, such as ingrained attitudes against women, the image of children as the property of the parents and apparent acceptability of sexual exploitation in some communities. Laws alone will never suffice to change these shortcomings. The educational approach and the dissemination of key information to change attitudes and behaviour need greater encouragement not only in terms of political will but also of budgetary commitment and action.

71. While it is apparent that legal sanctions are now available to some extent against abuses through the national and international structures, the implementation process leaves much to be desired, thereby demanding greater commitment from relevant quarters. A related challenge is to explore not only the "sticks" to punish exploitive elements but also the "carrots" to encourage agencies and personnel to improve their performance.

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Forty-seventh session
Agenda item 20

RIGHTS OF PERSONS BELONGING TO NATIONAL, ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES

Analytical compilation of the comments received in pursuance of paragraph 3 of Commission on Human Rights resolution 1990/45 on the rights of persons belonging to national, ethnic, religious and linguistic minorities

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Introduction

1. At the forty-sixth session of the Commission on Human Rights, an open-ended Working Group which the Commission has set up annually since 1978 adopted, in first reading, a draft declaration on the rights of persons belonging to national, ethnic, religious and linguistic minorities (E/CN.4/1990/41, annex).

2. At the same session the Commission on Human Rights, by resolution 1990/45 (paragraph 3) requested the Secretary-General to invite comments, for consideration by the Working Group, from Governments, specialized agencies, intergovernmental and non-governmental organizations, on the text of the articles of the draft declaration approved by the Working Group.

3. By the same resolution (paragraph 4) the Commission invited the Secretary-General to prepare for submission to the Working Group an analytical compilation of the comments received in pursuance of paragraph 3 of the resolution.

4. By a note verbale of 5 November 1990 the Secretary-General invited comments in pursuance of paragraph 3 of the above-mentioned resolution.

5. As of 22 January 1991 the Governments of the following States had submitted their comments: the Czech and Slovak Federal Republic; Germany; Finland; Hungary; Norway; Panama; the United States of America.

6. As of the same date comments had also been received from the following intergovernmental organizations: the Council of Europe; the Organization of American States, and non-governmental organizations: Baha'i International Community; B'nai B'rith International, World Jewish Congress; International Federation of Human Rights; International Federation Terre des Hommes; Four Directions Council; International Institute of Humanitarian Law; International League for the Rights and the Liberation of Peoples; Minority Rights Group.

GENERAL COMMENTS

Czech and Slovak Federal Republic

[2 January 1991]
[English]

7. Procedure of the CSFR Government with regard to securing the rights of minorities is based on a demand for the protection of minority members from any form of discrimination and supports a full guarantee of the generally recognized human rights and fundamental freedoms for these persons. The principle of equality of all inhabitants of the Republic creates a basis for full exercise of the rights of minorities and their members within the State.

8. However, being part of a minority does not entail privileges for its members in relation to the rest of the population within the State. The Czech and Slovak Federal Republic is of the opinion that this reality should be more clearly formulated in the draft declaration.

9. As far as the question of rights for national minorities is concerned, the CSFR Government bases itself on the multilateral European standard expressed in the Concluding Documents of the Vienna CSCE Follow-up Meeting and, particularly, on the Copenhagen Conference on the Human Dimension (Part IV), which considers a compromise acceptable to all countries in the given region to be an optimum solution. Therefore it recommends that the above-mentioned documents be taken into account when preparing the text of the declaration.

Germany

[7 January 1991]
[English]

10. In formulating the individual articles the declaration should consistently refer to the "rights of persons belonging to minorities". This corresponds to the wording of article 27 of the International Covenant on Civil and Political Rights, to which the mandate of the Working Group set up to draft the declaration expressly makes reference. This approach based on personal rights also appears necessary for the sake of effective exercise of the rights because in many cases it may not be clear who should be authorized to assert the rights of a minority as a whole.

11. So far the Working Group has left open the definition of a minority. In the view of the Government of Germany, the efforts to arrive at such a definition should be based on the definition proposed by Mr. J. Deschênes in his study presented to the Commission on Human Rights in 1985 (cf. E/CN.4/Sub.2/1985/31):

> "A group of citizens of State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law."

12. In the opinion of the Government of Germany, an essential feature of a minority is that the persons belonging to it should be nationals of the territorial State. Otherwise it may prove difficult to distinguish between the rights of persons belonging to minorities and the rights of foreigners and migrant workers; this might be detrimental to effective protection of the respective rights.

13. The existing draft should be expanded to include such rights of persons belonging to minorities as are particularly important for the preservation and advancement of their identity. These include above all the right to maintain educational, cultural and religious institutions, freedom of association, freedom of information and freedom of movement within a country as well as the right to leave any country and to return to one's own country.

Finland

[20 December 1990]
[English]

14. The Ministry of Justice notes with satisfaction that the efforts of the Working Group of the Commission on Human Rights to a declaration on the rights of minorities have proceeded to a first reading. The draft declaration seems to be drawn up with sufficient care to enable it to form the basis of an acceptable final declaration. The Ministry hopes that the work is continued as soon as possible, since it promises the prospect of possibly the first human rights instrument drawn up expressly for the purpose of protecting minorities which may be referred to when addressing the many difficult minority problems which are awaiting their solution in different parts of the world.

15. As to the contents of the draft declaration, the Ministry of Justice has no particular objections. It corresponds to the points of views on which the minority policy observed also in Finland is built. Most of the principles expressed in the draft declaration are contained in Finnish legislation.

16. There are also, however, other simultaneously ongoing projects for the preparation of minority rights instruments. The Council of Europe is preparing the European Charter for Regional or Minority Languages which is to be completed in 1992. The European Commission for Democracy through Law is preparing a Convention for the protection of minorities which apparently will be discussed in the agencies of the Council of Europe in the course of 1991. The Parliamentary Assembly of the Council of Europe has prepared a recommendation on the rights of minorities (Recommendation No. 1134 (1990)). Minority rights questions have been a central issue also in the CSCE-process, and at the Conference on the Human Dimension of the CSCE in Copenhagen significant decisions on minority rights policy were made.

17. Within the United Nations as well, minority rights questions have played a prominent part i.a. in the preparation of the Declaration on the Rights of Indigenous Peoples in the working group of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. In 1989 the ILO adopted a convention on the same questions; i.e. the Convention concerning Indigenous and Tribal Peoples in Independent Countries. The United Nations Convention on the Protection of the Rights of All Migrant Workers and their Families can also be mentioned.

18. Minority rights questions have thus been very much in the foreground in many fora and the results of the work are in constant interaction. It is indeed appropriate that new principles which have been established by one body often form a part of the work of another body dealing with corresponding questions.

19. The Ministry of Justice hopes that the draft declaration will be further developed in the light of the work carried out in the preparation of the other above-mentioned minority rights instruments. Since it is a declaration, it may be appropriate to proceed from the presently accepted minimum level to goals which are more ambitious than those possible when preparing conventions with a directly binding effect on States. At the same time, the Ministry of Justice considers it desirable that further refinement should not unduly delay the completion of the declaration.

Hungary

[2 January 1991]
[English]

20. International protection of the respect for human rights and fundamental freedoms is one of the foreign policy priorities of the Republic of Hungary. Since the rights of national, ethnic, religious and linguistic minorities are integral parts of universally recognized human rights, the regulation of these rights is an important and timely task. Minorities, enriching the life and culture of societies, are important links between countries, especially neighbouring countries; respecting and guaranteeing their rights contributes to national and international stability and enhances confidence and co-operation among States.

21. For all th e reasons the Hungarian Government welcomes and appreciates the work accomplished by the Commission on Human Rights in elaborating the draft declaration on the rights of persons belonging to national or ethnic, religious or linguistic minorities. It wishes to express the hope that by overcoming existing obstacles, finalization and adoption of the declaration will be possible. It would welcome it if increased international interest and attention regarding this subject would be reflected by finding more precise formulations relating to commitments by States for creating appropriate conditions that make it possible for minorities to develop their education, culture, language, religion, traditions and customs (e.g. right to have their own educational, religious and cultural institutions, right to establish organizations, etc.).

22. The Hungarian Government attaches priority to the finalization and adoption of the declaration, since this will pave the way for the international codification of minority rights, which it considers necessary.

23. It is the view of the Hungarian Government that the new standard-setting should include international control as well as viable individual complaint mechanisms.

24. The Government of the Republic of Hungary is ready to contribute actively to the achievement of these goals.

Norway

[19 December 1990]
[English]

25. The Norwegian Government supports the initiative of drafting a universal declaration on the rights of persons belonging to national, ethnic, religious or linguistic minorities. Norway is pleased to have this opportunity to comment on the present draft text which, in its view, lays a good foundation for further endeavours aiming to reach agreement on a universal declaration in this field.

26. In general Norway agrees with the approach itself of the draft declaration, which should apply to "national, ethnic, religious or linguistic minorities". We are of the opinion that it is not necessary to define this term. It is the view of the Norwegian Government that a universal declaration of this kind should not be limited to prohibiting discrimination of the said minorities, but should also recognize that special measures might be necessary in order to help a minority enjoy the same rights as the majority population. A provision to this end could most appropriately be inserted in article 1 of the draft declaration. This is also inconformity with Norway's interpretation of article 27 of the International Covenant on Civil and Political Rights, which implies that States accept the responsibility of contributing positively to enable minorities to maintain and develop their ethnic, cultural, linguistic or religious identity.

27. In addition, it is Norway's view that the draft declaration should clearly state the right of minorities to use their mother tongue freely in private as well as in public.

28. States should also be encouraged to give minorities adequate opportunities for instruction of their mother tongue or in their mother tongue and, wherever possible, for its use in dealing with public authorities.

29. Moreover, the declaration should state that minorities have the right to establish and maintain organizations or associations within their country and to participate in international non-governmental organizations. It should also state explicitly that persons belonging to national minorities may exercise and enjoy their rights individually as well as in community with other members of their group and that no disadvantage may arise for a person belonging to a national minority on account of the exercise or non-exercise of any such rights.

United States of America

[27 December 1990]
[English]

30. Ethnic and national differences and the tensions and hostilities engendered by them are in various parts of the world a most serious threat to peace. It is, therefore, of particular importance that the Commission on Human Rights try to come to grips with this problem and seek to set standards which, if promptly followed, would help reduce tension.

31. The draft declaration on the rights of persons belonging to national, ethnic, religious and linguistic minorities has been in the drafting stages for well over a decade. The Government of the United States has participated in this exercise, but regrets to observe that the current text contains certain flaws that would limit the contribution it would make toward the amelioration of existing problems. Although the current text touches on some of the key issues facing individuals who belong to minority groups, it offers insufficient guidance on how those issues should be addressed.

32. A second general observation is that the current text may unfortunately, if inadvertently, weaken human rights standards established in other international instruments. The current text, for example, borrows considerably from the Universal Declaration of Human Rights, but imposes new or broader limitations on some of the borrowed provisions. While the Government of the United States is certainly not opposed to reaffirming the standards established in the Universal Declaration, we are deeply concerned at the prospect of undermining any of those standards.

33. The Government of the United States therefore suggests that the focus of the draft declaration be made more narrow. The new declaration should deal exclusively with the rights of persons related to their membership in particular minority groups. The declaration should seek to protect these individuals from discrimination on grounds of their membership in such groups and to create an environment in which these individuals can preserve and protect the existence of their groups.

34. The new declaration need not reaffirm that individuals who belong to minority groups enjoy the same basic human rights and fundamental freedoms as all other individuals. As the current draft demonstrates, the attempt to restate these rights in a new declaration may well result in the adoption of language that actually weakens them. Moreover, once the process of reaffirming some of these general rights begins, it becomes necessary to reaffirm that minority individuals enjoy all of these general rights. Failure to reaffirm some of the rights will imply that minority individuals are not entitled to them.

35. The Government of the United States is also concerned about the manner in which the current draft addresses the rights of individuals who belong to religious minorities. In our view, the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief deals with these issues so fully that there is no need for a further effort at restatement. Accordingly, we urge that all references to individuals who belong to religious minorities be deleted from the draft, in favour of a preambular reference to the declaration on religious intolerance.

Council of Europe

[21 December 1990]
[French]

36. A number of projects in this area are in progress at the Council of Europe, but the texts concerned are still being discussed by the experts; as of now, no indication can be given as to whether they will be accepted by policy-making bodies.

37. The Council of Europe is also preparing a contribution to the meeting of experts on national minorities to be held in July 1991 in Geneva, in the framework of the Conference on Security and Co-operation in Europe.

38. Given the recent political changes in Europe, a number of legal and practical issues connected with the protection of minorities are likely to arise. It therefore seems premature for the Council to venture an opinion on the detail of the draft under discussion in the Commission on Human Rights.

39. The Council will nevertheless be happy to remain in contact with the Centre for Human Rights in the coming months.

Baha'i International Community

[4 December 1990]
[English]

40. The Baha'i International Community strongly supports the work undertaken to date by the Working Group in formulating a suitable declaration that will make an effective contribution to improving the human rights situation of minorities. We believe that the rights of persons belonging to minorities need to be fully protected, without discrimination, and that special efforts are required to enable minorities to maintain and pass on to the next generation the enriching and beneficial aspects of their culture, traditions and language.

41. At the same time, we believe that the goal of the enterprise at hand must not be separation. Human Rights will only become a reality for minorities if all human beings, while cherishing their unique individual and group identities, also develop an inner appreciation for the fundamental unity of the human race. In the Baha'i view, "the advantage of the part is best reached by the advantage of the whole". Only with such an appreciation of the bonds uniting all people can productive dialogue between minorities and majorities be sustained and lead to greater harmony and fuller enjoyment of human rights.

B'nai B'rith International, World Jewish Congress

[20 December 1990]
[English]

42. At the outset it should be stated clearly that the two organizations support fully the preparation and adoption of this declaration, if for no other reason than that it will assist in the implementation and interpretation of the principal provision on the subject of minorities in international instruments, namely Article 27 of the Covenant on Civil and Political Rights. This view is supported by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Francesco Capotorti (United Nations Publication, Sales No. E.78 XIV.i (1979))

43. Several issues call for comment: namely, the definition of minorities; whether the term "national" should be included, a term not contained in article 27 ICCPR; whether the phrase "persons belonging to" minorities should be used as distinct from simply a reference to minorities.

44. It is appreciated that many of these questions will be resolved in the light of the technical review of the text by the Centre for Human Rights and the further drafting and elaboration of the text by the Working Group itself on this basis and the various comments received.

45. It is noted that a definition of the term "minorities" has not been attempted. None of the attempts to define this term has met all the complexities and different aspects as to what constitutes a minority. The abundant literature on this question, which these summary remarks in no way purport to analyze, includes citations from the Permanent Court of International Justice. Other attempts to define the term "minorities" have also been carefully reviewed, notably in the Capotorti study, following earlier attempts by the Sub-Commission itself in 1954. Subsequently a proposal concerning a definition of the term "minorities" was submitted by Mr. Jules Deschênes (E/CN.4/Sub.2/1985/31). While these definitions are helpful, none seems to be fully adequate, particularly in the light of historical experience as reviewed against contemporary developments.

46. Subject to resolution of the above points by the competent review bodies, support is expressed for maintaining the full use of the expression as contained in article 27 ICCPR, of persons belonging to minorities, since clearly for all the arguments advanced in the relevant literature and as cited in the relevant provisions of the draft declaration and elsewhere, rights of minorities can be enjoyed both at the individual level of the person and in community with other members of the minority group concerned. Moreover, the significance attached to the term "minority" used in isolation is, for the reasons already advanced, capable of many interpretations and constructions according to the context in which it is used.

47. The importance of the term "national" is recognized in the sense attributed to the increasing dimensions of the problem of national minorities. The term "national" has always had significance, particularly in the context of other international instruments and national laws, as is evidenced by article 1 (1) of the International Convention for the Elimination of All Forms of Racial Discrimination, defining racial discrimination to include "any distinction, exclusion, restriction or difference based on .... national or ethnic origin". The term "national or ethnic origin", if not identical, has an undoubted synonymous connotation in the context of the enumeration of the grounds of racial discrimination. The French law of 1 July 1972, and article 32 of the French law of 7 June 1977 dealing with different aspects of racial discrimination, support this interpretation.

48. The essential purpose of these comments is to underline the fact that, based on the particular experience of persecution of Jews throughout the ages, it can be stated as a matter of historical record that Jews have been persecuted as members of minority groups on all the enumerated grounds. Thus, Jewish minorities have been denied their minority rights both as individuals and as entire communities, as national/ethnic, religious or linguistic minorities, and have been deprived of the right to enjoy their own culture, to profess and practise their own religion, and to use their own language. The most notorious example within living memory, as need hardly be recalled, were the acts of genocide against Jewish communities in Europe during the Second World War.

49. It is for this and related reasons that the experience of the minorities protection régime under the League of Nations between the two world wars has special relevance when viewed against the recent developments of persecution of national minorities in Eastern and Central Europe in recent months.

50. Indeed, this problem has reached such significant proportions that the proposal for a convention on minority rights may have particular relevance, in as much as this might well prove to become an international requirement, if present trends are to continue. (See the monograph "Towards a minority convention, its need and content" by Dr. S.J. Roth, to be published in the 1990 Israel Yearbook on Human Rights).

51. So far as the first reading of the draft declaration is concerned, draft article 2 has central importance in calling for the right of minorities to be protected against any activity which threatens their existence or otherwise prevents their full enjoyment and exercise of universally recognized human rights and fundamental freedoms.

52. Particular importance is attached to the commitment of all States undertaking to adopt legislation or other appropriate measures to prevent and combat such activities. Indeed, the emphasis on practical measures to ensure the full enjoyment of minority rights, in addition to prohibiting any threats or actions against them, is to be welcomed.

53. However, these comments also wish to stress the prior and fundamental need for States to recognize threats to minorities and minority rights in the form of persecution, discrimination or other denial of equality, which regrettably has characterized the violation of minority rights in the past.

54. The close association of national/ethnic persecution of minorities has been strongly emphasized in one particular regional context. In this connection, attention is drawn in particular to the provision of article 14 of the European Convention on Human Rights which, in referring to the principles of non-discrimination in the enjoyment of the rights and freedoms contained in this Convention, also mentions "discrimination ..... on any grounds such as ..... association with a national minority".

55. In the context of the protection of minorities in the present realities of Central and Eastern Europe, there is clearly an advantage in ensuring such protection in the widest possible terms under relevant international or regional instruments.

56. The problem of discrimination against minorities is of course not confined to Central and Eastern Europe. The joint Declaration against racism and xenophobia of 11 June 1986, signed by the three Presidents of the principal institutions of the European Community, is directly to the point. It will be recalled that this Declaration vigorously condemned all forms of intolerance, hostility and the use of force against persons or groups of persons on the grounds of racial, religious, cultural, social or national differences. The Declaration was very much influenced by the findings of the Evrigenis report of the European Parliament, which analyzed the phenomena of racism and racial hatred against minority groups. A follow-up report of the committee of enquiry of the European Parliament into racism and xenophobia, published in 1990, has shown an alarming increase in some instances of incitement to hatred and violence against various minority groups throughout

Europe. Amongst these phenomena has been prominently recorded the disquieting resurgence of antisemitism, together with other forms of racism and xenophobia directed against other ethnic, national, religious, cultural and linguistic minorities.

57. The detailed recommendations for action were adopted by the European Parliament on 9 October 1990. The measures contained in these recommendations closely parallel the letter and spirit of the draft declaration under examination, and in this respect we endorse in full the provisions of draft article 4 calling on all States to take legislative and other appropriate and effective measures, especially in the fields of teaching, education, culture and information, to promote and protect the human rights and fundamental freedoms of persons belonging to minorities.

58. We also believe that in the context of the resurgence of denial of rights of national minorities in the specific Central and Eastern European context, two further developments have relevance. While it is appreciated that the human rights documents emanating from the Conference on Security and Co-operation in Europe (CSCE), as enshrined in the Helsinki Final Act, are not necessarily of binding character in the sense of a multilateral treaty or convention, the commitments nonetheless entered into by the 34 States in question have particular importance in the light of contemporary events. It is of course appreciated that the definition of national minorities in the CSCE context does not fully correspond to the nomenclature of the relevant United Nations instruments, but there can be little doubt that the documents in which the commitments for the protection of national minorities are referred to, define national minorities in essentially the same terms as the United Nations instruments, emphasizing the ethnic, cultural, linguistic and religious aspects. The attention of the Working Group is therefore especially drawn to the contents of the Copenhagen document drawn up by the 34 States of the CSCE at the meeting held in that city from 5 to 29 June 1990, articles 32 -39 of which specifically extend the rights which the CSCE States recognize for national minorities. These rights refer, amongst others, to the preservation and development of their identity, their linguistic rights and the establishment and maintenance of the minorities' own educational, cultural and religious instruments, organizations or associations.

59. However, we wish also to emphasize that the contemporary resurgence of antisemitism as a particularly pervasive and pernicious form of discrimination and incitement to hatred against a specific minority was recognized for the first time in an international instrument. Article 40 of the text of the Copenhagen document is of special relevance in this context. It commences: "The participating States clearly and unequivocally condemn totalitarianism, racial and ethnic hatred, antisemitism, xenophobia and discrimination against anyone, as well as persecution on religious and idiological grounds". This is thus the first international instrument which specifically names antisemitism as a racist and discriminatory practice against a minority whose persecution as such throughout history has been one of the most characteristic and persistent phenomena in the sad chronology of intolerance, hatred and prejudice. The full text of this provision of the Copenhagen document is annexed hereto.

60. It may be remarked in passing that while in the earlier stages of the drafting of the Convention on the Elimination of All Forms of Racial Discrimination, specific reference to antisemitism had been included, it was finally excluded for extraneous political reasons.

61. It is for the reasons cited in connection with this provision of the Copenhagen document that we recommend that article 2, paragraph 2 of the draft declaration should include after the words "....all States shall undertake to adopt legislation or other appropriate measures to prevent and combat such activities", the wording inspired by article 40.1 of the Copenhagen document: "...as may be necessary to provide protection against acts that constitute incitements to discrimination, hostility, hatred or violence...".

62. The second specific matter on which we wish to comment refers to the recent Charter of Paris, signed by the 34 CSCE Heads of State or of Government on 21 November 1990, dealing inter alia with the problem of national minorities, expressing determination to promote the rights of national minorities, and referring concretely to their ethnic, cultural, linguistic and religious identity. It will be recalled that in order to strengthen and improve the protection of minorities, it was decided to convene a meeting of experts on national minorities in Geneva from 1 to 19 July 1991. The Paris Charter has given concrete recognition in this precise context to its resolve to deal with the underlying causes of persecution of minorities. The Charter states at this point: "We express our determination to combat all forms of racial and ethnic hatred, antisemitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds."

63. We strongly urge that in the review of the first reading of the draft declaration, due attention and consideration be given to these recent and most significant developments which should appropriately influence the further elaboration of the text by the Working Group at the forty-seventh session of the United Nations Commission on Human Rights.

International Federation of Human Rights

[14 December 1990]
[French]

64. As regards the need for a declaration of rights, the question of defining specific rights for minorities arose during the drafting of the Universal Declaration of Human Rights and posed a number of problems.

65. Because the Universal Declaration of Human Rights is silent on the question of minorities, later international and regional instruments, and their implementation and monitoring arrangements have sidestepped the specifics of the issue. Nevertheless, the protection of minorities remains a major and explicit concern of States and international organizations.

66. Attempts to establish a special international legal basis for the protection of minorities have hitherto always been unsuccessful. The main obstacles have been (a) the inability to define a "minority"; (b) the undesirability of establishing a catalogue of rights distinct from those universally recognized; and (c) the difficulty of restricting the circle of intended beneficiaries.

67. These obstacles have had the advantage of highlighting the illogicality of establishing, a general prescription for special protection outside the canon of ordinary human rights law.

68. The question is, how to avoid excluding people belonging to minorities from the general enjoyment of human rights - in other words, how to ensure that they are allowed universally acknowledged rights. Uniform and rigid rules cannot work in an area where the differing nature of the links which in their various ways establish membership of a minority community and the particular forms that they take in each State create a host of different situations to be allowed for.

69. Depending on the rights and circumstances involved, therefore, people belonging to minorities will exercise and assert their fundamental rights in many different and specific ways.

70. It is not so much through a declaration of rights as through international recognition of the most advanced practices and legislation in the form of model prescriptions that a United Nations instrument may be able to create the framework for equality of treatment, guaranteeing to all minorities that human rights are universal and indivisible.

71. If one considers the state of the law on the subject, both lex lata and lex ferenda, one finds that the domestic legislation and practice of many nations and international and European multilateral and bilateral law use protection clauses and special enforcement procedures to ensure equal treatment in the exercise and protection under ordinary law of the human rights and minorities in their territory, enabling them to:

(a) Exist as groups;

(b) Enjoy protection of their family and personal status;

(c) Use their languages in social interactions generally, in their relations with the public services and administrative and legal authorities, and in local assemblies;

(d) Receive and provide education in their own languages;

(e) Foster and protect their heritage and cultural activities;

(f) Enjoy unimpeded relations with other populations belonging to the same culture, whether or not a frontier separates them, through such means as multilateral conventions respecting the cultural unity of territories divided by frontiers;

(g) Be represented politically;

(h) Administer themselves or exercise local autonomy where a given area is culturally uniform;

(i) Participate effectively in affairs of State and in decisions affecting the regions where they live.

72. The draft Declaration appears to be a backwards step from provisions of this kind already in force in various countries.

73. The study which the Sub-Commission asked Mr. Eide to carry out on "Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities", which will survey national institutions and procedures for handling ethnic relations and situations

involving minorities, will be very helpful to the Working Group, enabling it to proceed knowing exactly what is available and, accordingly, produce a draft Declaration in line with the most advanced provisions on the subject.

74. At the most recent session of the Working Group on minorities, the Federation put forward a number of proposals which were summarized in paragraph 2 of the Group's report (E/CN.4/1990/41):

IV. THE ORGANIZATION OF FUTURE WORK

52. In light of the completion of the declaration in first reading, various suggestions and comments were offered as to how the Working Group could best complete its work at the second reading. The view was raised that the complexity of the minority issue had not been fully and comprehensively addressed by the Declaration which should set out more clearly the rights and responsibilities of both States and minorities. A request was made for the submission of four proposals to be considered at the next session of the Working Group relating to the minorities' right to specific parliamentary representation; multilateral conventions respecting the cultural unity of territories; unimpeded relations between populations sharing the same culture but separated by frontiers; autonomous administration; and, for the future, the possibility of establishing an international minority council should be considered.

75. The Federation also proposes the inclusion of an article reading:

In certain cases, a State may delegate some of its powers so as to permit autonomous territorial or personal administration by a minority group of matters of particular concern to it.

76. Such measures are already applied in many States, in Europe especially, under arrangements tailored to suit each case.

77. As regards autonomy, Mrs. Palley was equally clear in paragraph 18 of her study:

> While autonomy is not expressly required by article 27, it is a means of protecting and promoting the cultural, religious and linguistic rights with which article 27 deals exclusively. It is moreover a means of implementation which appears to be adaptable to a variety of different social, economic and political systems, provided of course that the minority group in question has some geographical character and is not largely dispersed among other sections of national society.

78. On the subject of unimpeded relations between populations sharing the same culture but divided by frontiers, the Federation suggests the following wording:

(a) Any person belonging to a minority is entitled to associate and have relations with other members of the same group in particular, beyond as well as within national frontiers;

(b) States with common frontiers in whose territory there live persons separated by those frontiers who belong to the same minority group should adopt bilateral or multilateral agreements facilitating the free movement of such persons.

79. Such agreements have been concluded by Italy with several contiguous States, including Austria and Yugoslavia.

80. The Federation also insists that its proposal regarding the possibility of setting up a conciliation and mediation mechanism to prevent or resolve any conflicts involving minorities needs to be added to the agenda for the next meeting of the Working Group.

81. Numerous conflicts involving minorities have taken place during the year since the last meeting of the Working Group; this in our view calls for urgent consideration of possible action by the United Nations to maintain peace and security.

International Federation Terre des Hommes

[10 January 1991]
[Spanish]

82. The text of the declaration is generally concerned with rights which can guarantee minorities their distinctive differences. The Federation believes some changes are necessary to prevent misinterpretations of the text. These are as follows:

1. The expression "persons belonging to" should be deleted throughout the text of the declaration, leaving only the word "minorities". This would be an improvement because the subjects would be regarded as collective entities;

2. References should not be to "national" minorities, just to minorities. Otherwise the first act of discrimination will be committed by the United Nations itself in omitting to recognize them;

3. All the passages mentioning that the rights covered by the Declaration must be exercised in accordance with national legislation should be deleted. The point seems obvious.

Four Directions Council

[2 December 1990]
[English]

83. Subjects of the rights contained in the declaration: In our view, the rights contained in the declaration are both individual and collective in character. Individuals enjoy these rights only because of their membership in a group, and in most instances can only exercise these rights effectively in community with the rest of the group. For example, the right to cultural development in article 3 (2) of the declaration is meaningless as an individual right, since culture, language, and customs are manifestations or expressions of organized social life.

84. One possible approach would be to go through the text of the declaration, and determine whether the rights contained in each paragraph have more of a collective ("minorities") or individual ("persons belonging to minorities") character. In our view, such an exercise would be tedious and inconclusive. Instead, we think the working group should adopt consistent terminology

throughout the declaration, inserting an explanatory clause as an additional sub-paragraph in article 5. If the subject of each article were "persons belonging to minorities", for example, the explanatory clause in article 5 would be:

5. Persons belonging to minorities may exercise their rights individually, as well as in community with the other members of their group.

Likewise, if the working group agreed to use "minorities" in each article, which has the virtues of brevity and simplicity, article 5 could include the following explanation:

5. As used in this declaration, "minorities" refers to the persons belonging to a national, ethnic, religious or linguistic minority, exercising their rights individually or in community with the other members of their group.

85. Legislative limitations: bracketed references to "national legislation" in articles 3 (3) and 4 (2) imply that national laws can override the rights to freedom of movement and expression. This is unacceptable, since these rights are already contained in articles 12 and 19 of the International Covenant of Civil and Political Rights, without so broad a limitation. We suggest that these two sentences be deleted, and replaced if necessary by an additional sub-paragraph in article 5 as follows:

6. The rights contained in this declaration shall be reflected in appropriate national legislation, and exercised in accordance with relevant international human rights instruments.

86. Groups included or excluded: the term "national" minorities has special meaning in Europe, as is elaborated in the concluding document of the Copenhagen meeting of the Conference on Security and Co-operation in Europe (CSCE). It would be inappropriate, for this reason, to exclude it from the text of the declaration, even though it may require an explanation, as part of the final report of the Working Group, that "national" minorities, in this sense, may not exist in other regions.

87. We are opposed to any further effort to define or categorize minorities in the declaration. Like "peoples", "minorities" is a concept that has different meanings in different regions of the world, and in different historical contexts. Practice will prove to be a better guide to interpretation, than a purely theoretical definition at this early stage of the work of the United Nations in the field of protection of minorities.

88. Renumbering of the articles: for reasons of logical order, we suggest the following renumbering of articles 5 through 8 and the "new article":

Article 5	was Article 7	(on participation)
Article 6	was Article 5	(savings clauses)
Article 7 (a)	was Article 6	(implementation by States)
Article 7 (b)	"new article"	(spirit of understanding)
Article 8	was article 8	(implementation by United Nations)

89. Implementation measures: the Working Group has an important role to play, at this stage of its work, in recommending measures for the implementation of the declaration after its adoption. In its current form, the declaration is broad and general, as befits a statement of policy, as opposed to a binding legal instrument. It will not be "enforced," so it can only be useful as the basis for a programme of national and international action. We support the four points adopted at the Working Group's last session, "to be included within a resolution accompanying the Declaration," as the foundation for such a programme.

International League for the Rights and Liberation of Peoples

[13 December 1990]
[French]

90. Are the rights of a group - minorities - or the rights of persons belonging to (national or) ethnic, religious, cultural or linguistic minorities, at issue? This point ought to be clarified.

91. The draft alternates between the adjectives "national" and "ethnic". Would it not be more sensible to begin by spelling out what is meant by the notions of nation and ethnic group?

92. The text does not define the term "minority". Who, moreover, decides who belongs to a minority? Do national and/or international authorities do so? This question is extremely important since it is linked to the kind and extent of the detailed information required of minorities (name, numerical size, area(s) found and social and economic characteristics).

93. The rights of minorities covered by the text are general rights sometimes described in very vague terms, notably in the case of education and teaching. Furthermore, the text is silent on the very important topic of employment and the sphere of social activities.

94. The text's treatment of the duties of States towards minorities is very sparse. Notions such as integration and assimilation are absent.

95. The text makes no stipulations as to machinery for the protection of minorities, including opportunities for appeal to national authorities and for seeking redress at the international level.

Minority Rights Group

[16 January 1991]
[English]

96. MRG believes that it is crucial to take early measures to resolve possible conflicts arising from minority situations. Our experience from over 20 years of research on how to avoid violent conflicts and fragmentation of States has shown that it is important to enable minorities to play a full role in States, rather than to marginalize minorities or deny existence. For MRG a full role in a State means, inter alia, having minorities participating effectively in all sectors of the society, in all levels of decision-making and in all aspects of administration.

97. A way to ensure that minorities have this constructive role in society is to protect them by ensuring equal rights in their lives. Non-discrimination is a universally recognized principle and rule in international human rights law, but experience shows that the existing human rights law has been insufficient in ensuring equality of opportunity between the majority population and the minority group(s) and the realization of equality in practice.

98. This paper is MRG's response to the Secretary-General's invitation. Although the time given to provide a reply was short, it was possible to anticipate this as the Commission on Human Rights has a special Working Group that has been discussing a draft declaration since 1978 and the Commission itself passed the first reading of the draft in March 1990.

99. The MRG wishes to support the constructive moves towards a declaration on minorities while recognizing the limitations of any text and the practical limitations of a declaration. The non-governmental World Congress on Human Rights in 1990 in India noted the need for a United Nations declaration on minorities and passed a resolution on this subject.

100. The General Assembly has in its resolution 41/120 given the following guidelines for standards setting activities in the field of human rights:

(a) Be consistent with the existing body of international human rights law;

(b) Be of fundamental character and derive from the inherent dignity and worth of the human person;

(c) Be sufficiently precise to give rise to identifiable rights and obligations;

(d) Provide, where appropriate, realistic and effective implementation machinery, including reporting systems;

(e) Attract broad international support.

101. In this paper MRG will make recommendations on the draft declaration in accordance with the General Assembly resolution and the principles of MRG while providing an expert commentary. In order to identify the most adequate principles for a declaration on minority rights, consideration will also be given to instruments and principles on minority rights set down by regional bodies such as the Conference on Security and Co-operation in Europe (CSCE).

102. MRG would also like to suggest to the Secretariat to bear in mind the instruments and principles on minority rights set down by these regional bodies, when carrying out the work on the technical review of the draft declaration, and especially to look for instruments and principles set down by the African and Asian regions, as well as the valuable constitutional rights in certain States.

General comments on contents

103. The Declaration should:

1. Stabilize the core of existing protection: the little that exists must not be lost;

2. Contribute to the interpretation and clarification of existing instruments;

3. Give substance to framework principles: the prescriptions of present law are necessarily general;

4. Remedy substantive lacunae in existing law;

5. Specify the essential and appropriate rights of minorities, omitting the non-essential;

6. Strike a fair balance between minority rights, and duties to the community;

7. Set out the extent of State obligations;

8. Stress the worth of minorities and the indispensability of a régime of minority rights to national and international stability.

Comments on the Title

104. The title should reflect as accurately as possible the substantive content of rights. Obviously, some resolution of the question of whether "minorities" or "members of minorities" have the rights in question must be achieved, and also the question of whether it is appropriate to include "national" minorities. The point about national minorities is discussed below in the discussion of draft article 1. On "individual" or "collective" rights, the general "individualist" context of human rights must be borne in mind. However, living instruments of international law do not respect doctrinal purity in any absolute sense. In the context of the draft declaration, what matters is not insistent repetition of one formula or another, but the logical correlation between the right in question and the purported holder of that right. Accordingly, the present commentary alludes to the appropriate description of the right-holder on an article-by-article basis.

MRG's recommendations on the title

105. MRG recommends the deletion of the word "or" between the words "National" and "Ethnic".

Measure of implementation

106. The possibility of an accompanying resolution incorporating measures of international implementation would considerably strengthen the declaration. In view of the relative slowness of the United Nations in arriving at the present text and the lack of immediate prospects for a treaty on the rights of minorities, the measures assume considerable importance. The requirement -(iii)- that minority statistics are to be provided by States is particularly valuable in the context of States continuing to deny that they have any minorities within the scope of the Declaration. In view of what has been said in this commentary on relativity of obligations, accurate factual assessments of minority presence and social and economic conditions in States are vital.

COMMENTS ON THE PREAMBLE

United States of America

[27 December 1990]
[English]

107. The second preambular paragraph refers to "the equal rights of men and women and of nations large and small". An analogous preambular paragraph in the Universal Declaration of Human Rights refers only to "the equal rights of men and women". While nations certainly have rights, only individuals have "human rights". Given that this declaration will be in the nature of a human rights instrument, the Government of the United States believes that it would be appropriate to delete the phrase "and of nations large and small" from the second preambular paragraph.

108. The third preambular paragraph lists a variety of international instruments in the field of human rights.

109. As noted above, the Government of the United States believes that specific mention should at very least be made of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. The principles set forth in that Declaration are of particular importance to persons belonging to many minority groups.

110. The phrase "persons belonging to" appears in brackets before the word "minorities" many times throughout the operative paragraphs. The Government of the United States firmly believes that this phrase must be retained without brackets. The declaration is based on the premise that individuals who happen to be members of minority groups enjoy certain rights and protections as incident to their membership in such groups. The declaration should not assert or imply that these rights and protections attach to the groups themselves.

Minority Rights Group

[16 January 1991]
[English]

111. Paragraph 1: seems appropriate in view of the fundamental law-making contribution of the Charter of Human Rights.

112. Paragraph 2: [Reaffirming] [Reiterating] [Declaring] faith in fundamental human rights .... This should be resolved in favour of eliminating the reference to "declaring"; general human rights have already been "declared" in the Universal Declaration of Human Rights. There is no objection to "reaffirming" or "reiterating", though some thought might be given to "confirming" faith in rights. In General Assembly resolution 96 (1) the States voted to "affirm" that genocide was a crime under international law; in article I of the Genocide Convention, this became "confirm". Perhaps a similar transition is appropriate here in view of the acknowledged standing of human rights.

MRG's recommendations on paragraph 2

113. MRG recommend the substitution of the word "Confirm" for the words "[Reaffirming] [Reiterating] [Declaring]".

114. Paragraph 3: the purpose of this paragraph is to indicate existing legal principles on minority rights, stressing the continuity of the declaration with them. Some such reference is in principle desirable, if only to rebut the argument that minority rights are antithetical to "universal" human rights. The paragraph should reach out to the universal instruments; the regional and bilateral instruments are primarily European but the declaration is intended for universal application. Subject to drafting style and consistency, a reference to the International Covenant on Civil and Political Rights appears appropriate.

MRG's recommendations on paragraph 3

115. MRG recommend the insertion of the words "the International Covenant on Civil and Political Rights," after the words "the Universal Declaration of Human Rights,".

116. Paragraph 4: there is a difference between "inspired by" and "based on". If the declaration is only intended to contribute to the interpretation of article 27, "based on" expresses better this desideratum. If, on the other hand, the intention is also to supplement and extend the article regarded as the first step in a process of development of a rights discourse, "inspired by" is better. The looser ("inspired by") connection is preferable especially if the reference to rights of "persons belonging to" is retained; the declaration would not then be so closely tied to the article which has any limitations (supra).

MRG's recommendations on paragraph 4

117. MRG recommends the deletion of the words "[Based on]".

118. Paragraph 5: this is an important affirmation on behalf of the minorities and MRG recommends that it should be retained.

119. Paragraph 6: the reference to the exceedingly complex Declaration on Principles of International Law adds little or nothing to the text and could introduce unnecessary complications. Inter alia, it encourages arguments on the relationship between the principles contained therein such as non-intervention and minority rights, which ought to be accommodated through natural evolutionary processes.

120. Paragraph 7: overlaps with paragraph 5. The combination of the sentiments expressed in paragraphs 5 and 7 is that minority rights contribute to national and international stability and friendship etc. The two aspects could be combined in one positive paragraph. The reference to "the existing constitutional framework" (paragraph 7) is undesirable since that framework is as likely to hinder minority rights as to promote them. Probably what States require is that minorities show respect for the institutions of the State. Such respect cannot be absolute, but will depend upon the general justice of State institutions.

MRG's recommendations on paragraph 7

121. MRG recommends the substitution of the words "will contribute to the respect of the territorial integrity of States, promote economic, social and cultural development and enhance the stability of the States in which they live and" for the words "as an integral part of the development of society as a whole and within the constitutional framework, would in turn".

122. Paragraph 8: serves as a reminder of the body of law that can be used to interpret the declaration. The range of reference is probably sufficient, bearing in mind that the declaration will emanate from the United Nations. It should not be narrower, since the work of developing minority rights by the general United Nations bodies (the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities) is broad, conceptual and programmatic; the work of the Human Rights Committee relates mainly to working through the implications of article 27 of the Covenant on Civil and Political Rights.

MRG's recommendations on paragraph 8

123. MRG recommends the insertion of the words "other regional intergovernmental forums and" before the words "the bodies established".

124. Paragraph 9: is "international law" an acceptable substitute for "international human rights instruments"?

COMMENTS ON ARTICLE 1

Germany

[7 January 1991]
[English]

125. The prohibition of discrimination should not, as envisaged in paragraph 2, be confined to the enjoyment of human rights. Preference should be given to a general prohibition of discrimination, and should include the principle of equality before the law. The wording might be modelled on article 26 of the International Covenant on Civil and Political Rights.

United States of America

[27 December 1990]
[English]

126. Article 1, paragraph 2 seeks to reaffirm that persons who belong to minority groups enjoy the same human rights and fundamental freedoms as all other persons do. To make this point more clearly, the Government of the United States suggests that the last phrase of this paragraph be amended to provide "and all other internationally recognized human rights and fundamental freedoms". This paragraph, as amended, would obviate the need for any further reaffirmation in the declaration of rights recognized in other instruments.

Minority Rights Group

[16 January 1991]
[English]

127. Paragraph 1: (a) The question of a definition, and the basic description of "minority" require comment. By resolution 1984/62 of 15 March 1984, the Commission requested the Sub-Commission to prepare a definition of "minority". A report prepared by Mr. J. Deschenes (E/CN.4/1985/31 and Corr.1) was duly transmitted to the Commission together with the summary records of the Sub-Commission's discussions. However, the Working Group agreed in 1986 to postpone the question (E/CN.4/1986/43, para. 12) and the text of the draft declaration does not attempt a definition. Accordingly, there is only a description of the relevant groups "[national or] ethnic, linguistic and religious". In various international instruments the relevant descriptions of groups are: "racial, religious or linguistic" (articles 8 and 12 of the Polish Minorities Treaty); "national, ethnical, racial or religious" (article II of the Genocide Convention); "racial or ethnic" groups to which "special measures" can be applied (article 1(4) of the Convention on Racial Discrimination); "ethnic, religious or linguistic" (article 27 of the Covenant on Civil and Political Rights); "national minorities" (article 5(c) of the Convention against Discrimination in Education). Grounds on which cognate forms of discrimination are prohibited are almost inevitably wider: e.g. "race, colour, descent, or national or ethnic origin" (article 1(1) of the Racial Discrimination Convention).

128. The draft follows article 27 of the Covenant on Civil and Political Rights, stressing the affinity of the two instruments. The major difference is the potential addition of "national" to the declaration, a term favoured in Eastern Europe. The Soviet Union defined "national" at the ninth session of the Commission as "an historically formed group of people characterized by a common language, a common territory, a common economic life and a common psychological structure manifesting itself in a common culture" (E/CN.4/SR.369, para. 16). "National" in this sense is a relatively narrow term. It can also be confused, and frequently is confused, with the purely political/legal sense of the word, as in "Brazilian nationals". "Ethnic", on the other hand, is a wider, more flexible term (free for example, from territorial associations) implying that groups are protected even before they reach the dimensions of a "national" group. In the context of a universal instrument, the more flexible term is to be preferred. Further, "national" retains European overtones, which may limit its general acceptability; in African and Latin American contexts, assigning rights in the context of "ethnic" identity may appear less threatening to the States.

129. On the need for incorporating a definition of the word "minority", opinions clearly differ. Two much-discussed definitions are set out by Capotorti and Deschenes, but it is not proposed to choose between them. Perhaps it is enough to note that the absence of definition could facilitate evasions by States of their obligations through claims that there are no minorities in their territory. However, the Human Rights Committee in the operation of article 27 has taken a largely commonsense view and does not appear to have been unduly impeded by the lack of further juristic precision.

130. The absence of definition does, however, leave some puzzles. For example, in considering whether the State should act positively to promote minority culture, etc., is it necessary to insist that the minorities are its own nationals or citizens? If it is not, then is the host State expected to support "foreign" culture? The tradition on international law reflects the narrower view: the "protection of aliens" is one institution; the "protection of minorities" is another, and State obligations have a finite extent. Without exploring all the ramifications of a definition, the text as a whole might gain if it were made clear that the focus of minority rights is on those who possess the citizenship or nationality (in the legal sense) of the State in question. This was the practical limitation on rights expressed in the régime of the League of Nations which, even in the context of the present universal system of human rights, appears fully justified.

131. (b) The identity rights is a key right and is properly included. The right most appropriately correlates with the group rather than individuals. The function of "without any discrimination" in this context is unclear. At some point in the text, however, there must be a general reference to the rule of non-discrimination, on the premise that whatever specific rights they may possess, members of minorities are entitled to universal rights on a non-discriminatory basis. Article 1 would be appropriate for making such a statement. The minorities, according to paragraph 1, have the right to "the promotion of" their identity as well as respect for this identity. This is a valuable addition to the scheme of article 27 of the Covenant on Civil and Political Rights, in that it makes clear what may only be implied in the latter article (in the interpretation above). Further, the negative wording of article 27 is eclipsed in the draft article 1 by a positive statement of minority rights.

MRG's recommendations on article 1, paragraph 1

132. (a) The draft declaration in the title and throughout the rest of the declaration lists different groups as beneficiaries: "national, ethnic, religious or linguistic minorities". MRG is of the opinion that a description of the beneficiaries is actually providing a sufficient definition. This description is precise enough to identify the beneficiaries of this declaration (other declarations cover other groups of people), and a definition of each word of the phrasing is not necessary.

133. The draft declaration seems to be inconsistent in the description used in the different provisions. The title of the draft is mentioning "national or ethnic, religious or linguistic minorities", whereas article 1 mentions "national or ethnic, religious and linguistic minorities" and the new article mentions "national, racial, ethnic and linguistic minorities".

134. The same description should be used throughout the text, and MRG recommends to use the description suggested for the title: "national, ethnic, religious or linguistic".

135. (b) Where the phrase "persons belonging to minorities" is used alone, it indicates that the granted rights is an individual right. Following the preambular paragraph 4, the draft declaration has been "inspired by" [based on] article 27 of the Covenant on Civil and Political Rights. The declaration should therefore at least use the phrase of article 27 "persons belonging to minorities - in community with other members of their group" throughout the whole text. The suggestion will be recommended as new article 1, paragraph 2.

136. Paragraph 2: the human rights in question are more than adequately secured in a range of "universal" instruments, and do not relate to the specifics of the case for minorities. A more appropriate right in the context of the first article in the declaration is the right to existence (discussed in relation to article 2, infra).

MRG's recommendations on article 1, paragraph 2

137. MRG recommends the inclusion of a new article 1, paragraph 2 with the following wording:

> 2. Persons belonging to minorities can exercise and enjoy their rights as set out in this declaration individually as well as in community with other members of their group.

The original article 1, paragraph 2 becomes article 1, paragraph 3.

COMMENTS ON ARTICLE 2

Germany

[7 January 1991]
[English]

138. The relationship between the concept of propaganda and freedom of expression does not seem clear. The definition of prohibited activities and expressions of opinion should be geared even more closely to article 20 of the International Covenant on Civil and Political Rights or article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination.

Norway

[19 December 1990]
[English]

139. The reference to "their respective constitutional processes" in article 2, paragraph 2 could be interpreted as limiting the States' obligations. Therefore Norway believes that it would be more appropriate to commence this paragraph as follows, "All States shall undertake ...". The rest of the paragraph should be maintained as it stands.

United States of America

[27 December 1990]
[English]

140. Article 2, paragraph 1 states that persons belonging to minorities have the right to be protected against certain activities, including propaganda. The Government of the United States has doubts about retention of the phrase "including propaganda". In our view, Governments should generally not be given licence to censor the expression of ideas due to their content. Instead, it might be more useful to replace the concept of suppressing propaganda with the more limited notion of preventing individuals from inciting others to violence against members of minority groups.

141. Article 2, paragraph 1, subparagraph (ii) would protect minority individuals from any activity which "(interferes with their freedom of expression or association) (or the development of their own characteristics)". The Government of the United States believes that the second bracketed phrase is too vague and would be too difficult to implement. We suggest replacing it with the phrase "or their cultural development".

International Federation Terre des Hommes

[10 January 1991]
[Spanish]

142. The phrase "directed against minorities" in article 2, paragraph 1, should be deleted. Propaganda may not be aimed directly against any group but it can still be discriminatory. Nothing should be deleted from subparagraphs (i) and (ii). The expressions "or identity" and "interferes with their freedom of expression or association or the development of their own characteristics" should thus be retained.

Four Directions Council

[2 December 1990]
[English]

143. Article 2(1). We support the removal of all the square brackets, and suggest that subparagraph (ii) be re-worded as follows, in line with the 1978 UNESCO Declaration on Race and Racial Prejudice:

> "interferes with their freedom of expression, association, or cultural development;"

144. Article 2(2). For greater clarity, we suggest replacing the text in square brackets with the following words: "as well as any relevant international treaties to which they are parties".

Minority Rights Group

[16 January 1991]
[English]

145. Paragraph 1: the reference to existence in subparagraph (i) is important. The "right to existence" was set out in article 1 of the original Yugoslav draft declaration. If one takes the rights of minorities in order, it can be argued that the right of existence comes first, even if we accept that it is only physical existence that is protected (supra on the Genocide Convention). The right is implied in the Genocide Convention for a range of groups, but it is appropriate in the declaration (a) to express the right, and (b) to target minorities as direct beneficiaries. Existence is a group right in this context.

146. In subparagraph (ii) the reference to freedom of expression and association appears to have strayed in from other instruments on human rights and could be deleted. In any case, subparagraph (iii) takes care of freedom of expression and association, which are universally recognized rights.

147. The whole article should form a logical counterpart to earlier statements of basic rights. A reformulated structure would then be: article 1 - rights to existence and identity; article 2 - threats to existence and identity. If deemed appropriate, threats to the enjoyment of universal rights could also be referred to, subject logically to a previous statement of the entitlement of members of minorities to all human rights on a non-discriminatory basis.

148. Paragraph 2: given the present structure or a reformulated one, this is unfortunately phrased - the references to constitutional processes and international treaties are redundant. The paragraph would lose nothing if it simply began "All States ...".

MRG's recommendations on article 2, paragraph 2

149. MRG recommends the deletion of the words "In accordance with their respective constitutional processes and in accordance with the relevant international treaties to which they are parties" to have consistency between article 2(2) and article 4(1).

COMMENTS ON ARTICLE 3

Germany

[7 January 1991]
[English]

150. The subordination of rights to national legislation, as envisaged in paragraph 3, is apt to erode these rights to a large extent and should be deleted.

Norway

[14 December 1990]
[English]

151. The brackets in the first part of article 3, paragraph 2, should be deleted to make it clear that "all States shall take measures to create favourable conditions to enable minorities to express their characteristics, ...".

152. The rest of the paragraph should be maintained as it stands, and the brackets around the word "education" should be deleted.

153. In article 3, paragraph 3, the brackets around the words "and with other minorities" should be deleted. The last sentence of this paragraph, in brackets, should be deleted.

United States of America

[27 December 1990]
[English]

154. Article 3, paragraph 1 provides that persons belonging to minorities have the right, inter alia, "to use their own language". The Government of the United States firmly supports this in principle. The right of a particular minority to use its native or historical language freely can be an important element in preserving its cultural identity. However, it must also be recognized that in some countries the existence of numerous linguistic minorities can make it difficult, if not impossible, for the Government to interact with members of each minority in their own language. In such circumstances, Governments should allow members of such minorities to use their own language among themselves, but in turn must be permitted to require such individuals to use a particular language (or languages) when dealing with Government officials.

155. Article 3, paragraph 3 includes a final, bracketed sentence that would make the right of persons belonging to minorities to leave any country, including their own, and to return to any country subject to national legislation and relevant international human rights instruments. The Government of the United States believes that this bracketed sentence should be deleted because it suggests that the rights protected by the Universal Declaration could readily be circumscribed by national legislation. If it is

retained, the reference to national legislation should at least be deleted. In the Universal Declaration of Human Rights, the right to leave is not subject to such a broad limitation.

Baha'i International Community

[4 December 1990]
[English]

156. First, we propose that article 3, paragraph 2 be amended to add, after "traditions and customs," the phrase, "to receive adequate education and training without discrimination". Thus, the revised paragraph would read:

> "2. All States (which have not yet done so) shall (take measures to create favourable conditions to enable (persons belonging to) minorities to freely)/(ensure that (persons belonging to) minorities are freely able to) express their characteristics, to develop their (education), culture, language, religion, traditions and customs, to receive adequate education and training without discrimination, and to participate on an equitable basis in the cultural, religious, social, economic and political life in the country where they live."

157. We propose this addition because minorities will only be able to assume their rightful place in society if they have access to high-quality education, without discrimination. Too often, educational facilities in regions inhabited by minorities have been substandard, and many members of minorities have not even received the most elementary schooling. Members of minorities should be given the opportunity to study their own language and culture, and to acquire the practical and social skills necessary for them to succeed both in their local communities and within the majority society. We hope the campaign to provide Education for All by the year 2000 will provide added impetus to the establishment and improvement of schools in regions inhabited by minorities.

158. In particular, we believe the education provided to all peoples should aim to develop each individual's intellectual and social capacities and should include practical experience in consultation - the process of reaching solutions with other people through honest and frank discussion, motivated above all by a search for common ground. Only through the process of consultation can enduring solutions be found to the tensions among minorities and majorities.

International Federation Terre des Hommes

[10 January 1991]
[Spanish]

159. In article 3, paragraph 2, the best wording would be the shortest: "All States shall enable minorities ...".

160. It is essential that the phrase "and with other minorities" in paragraph 3 should remain.

Four Directions Council

[2 December 1990]
[English]

161. Article 3(2). We believe that the alternatives contained in square brackets can best be reconciled as follows: "All States shall ensure that persons belonging to minorities are freely able to ...". This implies the obligation to take measures to create favourable conditions, where such measures are necessary or these conditions do not already exist. We also support removal of the square brackets around the word "education", because the right of minorities to transmit their identity to future generations is an essential element of cultural survival and development. As such, it is one of the most important activities minorities should be able to engage in freely.

162. Article 3(3). We do not oppose the deletion of the words in square brackets ("and with other minorities"), because we feel it may detract from the principal aim of this paragraph as a whole, which is to ensure the greatest possible free flow of ideas and information among all of the persons belonging to a particular national, ethnic, religious or linguistic group, regardless of their residence. For the sake of consistency with article 12 of the International Covenant on Civil and Political Rights, we also recommend revising the latter part of this paragraph as follows:

> "... especially by the exercise of the right to choose their residence within the territory of a State, and the right to leave any country, including their own, and return to it".

Minority Rights Group

[16 January 1991]
[English]

163. Paragraph 1: the right as expressed does not make sense. Article 27 of the Covenant on Civil and Political Rights describes the rights therein as rights of individuals exercised "in community with the other members of their group" (individual rights collectively exercised). The draft's reference to "individually or in community with the other members of their group" suggests that in some cases, culture, language and religion are private rather than communal. A State could claim compliance with the existing text of article 3 by allowing individuals their cultural rights whilst forbidding their communal expression. This would strike down the whole concept of minority rights.

MRG's recommendations on article 3, paragraph 1

164. MRG recommends the deletion of the words "individually or in community with other members of their group".

165. Paragraph 2: overlaps considerably with article 6. What is needed is a coherent, concise account of the positive obligations of States towards some ideal of equality in fact between majority and minority. Article 1 has already set the tone of the Declaration by promising the right to "promotion" of minority identity; this should be followed through.

166. The right to participate in national political and social institutions is worth specifying as a separate right, and is also set out in draft article 7. Group exclusion from participation in national life is a specific grievance of some minorities. A genuine right to participate also deflects group claims under the Declaration on Principles of International Law, which, on some interpretations, suggests that excluded groups have a right to secede from the State. Article 3 refers to "equitable participation"; article 7 (a) prefers "effective participation". Duplication should be avoided, and "effective" appears stronger than "equitable" in this particular context - the latter term would be the more appropriate one when considering distribution of resources, and it was in that context that it was used in the League of Nations treaties. Article 35 of the CSCE Copenhagen Document (supra) may be a slightly better text: it refers to "the right to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of ... minorities".

MRG's recommendations on article 3, paragraph 2

167. MRG recommends the deletion of the words "which have not yet done so".

168. Paragraph 3: the ideal of cross-border contacts between members of minority groups in a world of States frequently divided by artificial frontiers is laudable. However, in view of the importance attached by States to their territorial integrity, some care is needed in the expression of any rights of contact. The words in square brackets should be deleted, since the essence of the right is linkage with other members of the group in question, not with any and every minority group. The right to leave and return is undoubtedly a necessary support in this context. The right to "cross-border contacts" appears to the present author to be admissible without qualification. The same cannot be said of the residence right, set out in the paragraph. The rights are separable, and the right to residence appears unrealizable. Article 32.4 of the CSCE Copenhagen Document provides a model for the contacts right: "Persons belonging to ... minorities have the right ... to establish and maintain unimpeded contacts among themselves within their country as well as contacts across frontiers with citizens of other States with whom they share a common ethnic or national origin, cultural heritage or religious beliefs". In the draft declaration, the use of the term "persons belonging to" appears correct.

MRG's recommendations on article 3, paragraph 3

169. MRG recommends the deletion of the words "This right shall be exercised in accordance with national legislation and relevant international human rights instruments", as the purpose of this clause is already covered by article 5.

COMMENTS ON ARTICLE 4

Germany

[7 January 1991]
[English]

170. The obligation of States to promote the human rights and fundamental freedoms of persons belonging to minorities, as contained in paragraphs 1 and 2, is welcomed, as is the notion of international co-operation for the benefit of minorities, as expressed in paragraph 3. However, being completely different, the idea contained in paragraph 3 should be distinguished from the State obligations of a domestic nature in paragraphs 1 and 2 and be included in a separate article.

Norway

[14 December 1990]
[English]

171. The last sentence of article 4, paragraph 2, in brackets, should be deleted.

United States of America

[27 December 1990]
[English]

172. Article 4, paragraph 2 essentially restates a fundamental freedom set forth in the Universal Declaration, namely the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers. For reasons discussed above, the Government of the United States believes that this provision does not add anything to this declaration and, indeed, may only undermine existing standards. In our view, the paragraph should be deleted.

Baha'i International Community

[4 December 1990]
[English]

173. Second, the Baha'i International Community proposes that article 4, paragraph 1, be amended to add the following new sentence at the end: "In particular, States shall permit the exchange of, and take steps to disseminate information about minorities and their unique languages, cultures and religions, with a view to promoting understanding, tolerance and friendship among all people, including persons belonging to minorities".

174. Accordingly, article 4, paragraph 1 as amended would read:

> "All States shall take legislative or other appropriate and effective measures, especially in the fields of teaching, education, culture and information, to promote and protect the human rights and fundamental freedoms of (persons belonging to) minorities. In particular, States shall permit the exchange of, and take steps to

disseminate, information about minorities and their unique language, culture and religions, with a view to promoting understanding, tolerance and friendship among all people, including persons belonging to minorities."

175. We believe that ignorance of minorities and their way of life is one of the principal causes of the intimidation and discrimination that minorities suffer. Thus, education that seeks to instill in every individual a greater knowledge of, and appreciation for, the rich contributions that minority cultures have made to society is a critical requirement for the full realization of the human rights of minorities.

Article 4, paragraph 2

176. Third, we suggest that a new sentence be added at the end of the first sentence in article 4, paragraph 2, to read as follows: "Such measures shall furthermore include facilitation of the freedom of all people to interact with persons belonging to minorities and persons belonging to majorities for the purpose of fostering better mutual understanding".

177. Paragraph 2 would then read:

"Such measures shall include facilitation of the enjoyment by (persons belonging to) minorities of their freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, in particular through utilization of all forms of communication. Such measures shall furthermore include facilitation of the freedom of all people to interact with persons belonging to minorities and persons belonging to majorities for the purpose of fostering better mutual understanding. (This freedom shall be exercised in accordance with national legislation and relevant international human rights instruments)."

178. It is essential that all people be able to interact, mingle, and learn about one another's unique culture, in order to achieve greater harmony and understanding among minorities and the dominant culture. Separation will only breed greater ignorance. Accordingly, we believe that the declaration should protect the freedom to interact with all people without unreasonable interference.

Four Directions Council

[2 December 1990]
[English]

179. Article 4(2). The word, "communication" is ambiguous here and inconsistent with the terminology of article 19 of the International Covenant on Civil and Political Rights "any media of his choice". It is meaningless, moreover, to include the words, "in particular", since all transmission of information must obviously be by means of some form of commnication medium. We suggest the revision of this paragraph as follows:

2. Such measures shall include facilitation of the enjoyment by persons belonging to minorities of their freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, by any medium of their choice.

180. Article 4(3). While we have no strong preference for either of the alternatives in square brackets, we belive that the first alternative is both sufficient and has the advantage of brevity.

Minority Rights Group

[16 January 1991]
[English]

181. The general thrust of this article is welcome in specifying the duties of States towards minorities. There is, however, a considerable overlap with article 6 and article 3(2). As suggested above (discussion of 3(2)), a general formula is needed to indicate the general direction of State obligations, towards a régime which promotes the survival and flourishing of minorities within the State, mitigating their recurring difficulties in cultural and related terms. The need is for the equivalent of the "special measures" clauses of, e.g., the Racial Discrimination Convention, but without the limitations therein. In particular, there should be no suggestion of a "time-limited" support by the State. As long as minority status persists, so will the special measures be required. In terms of a declaration, perhaps it is feasible to do no more than leave the obligation expressed in general terms, and of the formulae in the draft declaration, article 6 appears to be better drafted (subject to comment below). If, on the other hand, the need for further specification of content is accepted by the Working Group, that content might usefully relate to "institutional" issues such as official languages of the State; use of minority languages in public affairs, mother-tongue and religious education; support for minority culture in national budgets; freedom to establish educational, cultural and religious organizations in general; freedom to participate in international non-governmental organizations. The institutional, public aspect of the various rights of minorities is crucial, since it is primarily through organizations that groups ensure their survival and development; purely "private" rights are limited in this context. The present author is of the opinion that further specification of State obligations is desirable; whether this is politically acceptable is another matter.

MRG's recommendations on article 4, paragraph 2

182. MRG recommends the deletion of the words "This freedom shall be exercised in accordance with national legislation and other relevant international human rights instruments" as the purpose of this clause is already covered by article 5.

COMMENTS ON ARTICLE 5

Germany

[7 January 1991]
[English]

183. Paragraph 3 should be worded more precisely, perhaps as follows:

> "Nothing in the present declaration may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes and principles of the Charter of the United Nations, including the principle of territorial integrity."

United States of America

[27 December 1990]
[English]

184. Article 5, paragraph 3 provides that "nothing in this declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations and, in particular, contrary to the sovereignty, territorial integrity and political independence of States." The Government of the United States is of the view that the latter half of this provision is inappropriate in a human rights instrument of this nature. Human rights is properly a subject of international concern. International organizations, Governments and non-governmental organizations must be allowed to speak out against violations of human rights wherever they occur. This declaration should not provide a basis for States to characterize such activity as contrary to their sovereignty, territorial integrity or political independence.

Baha'i International Community

[4 December 1990]
[English]

185. Finally, we suggest that article 5, paragraph 3, be amended to read as follows:

> "Nothing in the present Declaration may be construed as permitting any activity contrary to the purpose and principles of the United Nations. <u>The Declaration shall be construed with due regard for the sovereignty, territorial integrity and political independence of States</u>".

186. We recommend this change in wording because it makes it more clear that such loose and manipulable concepts as "sovereignty" and "territorial integrity" cannot be used to override the rights set forth in the declaration; otherwise, the declaration would be pointless. Rather, the legitimate place of these concepts would be better recognized if the declaration were to be construed "with due regard" for them.

Four Directions Council

[2 December 1990]
[English]

187. Article 5. As noted above, we are recommending the addition of two sub-paragraphs on the questions of the collective exercise of rights and the application of national legislation. We also believe that sub-paragraph 2 could be phrased more clearly. The declaration itself cannot prejudice anyone's rights. The danger lies in the possibility that a State will interpret and apply the declaration in a way that conflicts with other instruments in the field of human rights. We recommend revising the text to read:

> 2. This declaration shall not be implemented in such a way as to prejudice the enjoyment of universally recognized human rights and fundamental freedoms by any person.

International League for the Rights and Liberation of Peoples

[13 December 1990]
[French]

188. Article 5, paragraph 4, is highly inadequate on the subject of the duties of minorities.

Minority Rights Group

[16 January 1991]
[English]

189. The article as a whole seeks to set the Declaration in (a) the context of the international obligations of the State, and (b) the general international law relating to human rights.

190. Paragraph 1: is satisfactorily drafted. It is noted that, while it is not specified, international customary law must be implied in "international obligations". International law as a whole is the correct frame of reference when the general obligations of States are considered.

191. The paragraph also means that when States interpret the scope of their international obligations, the terms of the declaration must be given due weight in the case of inconsistencies or unclarities. In particular, the thrust of the declaration in favour of support for minority identity should be accounted for in the interpretation of instruments which are broadly

"inegrationist" in objective (such as the International Convention on the Elimination of All Forms of Racial Discrimination): the preservation of a group identity should not be regarded as antithetical to integration, but complementary to it.

192. Paragraph 2, 3, 4: these paragraphs are necessary in view of the apprehensions of (a) those who regard minority rights as somehow interfering with universal human rights, and (b) States which see in the concept of minority rights a threat to their sovereignty and territorial integrity. The fears and apprehensions must be set to rest. The article as a whole is well drafted and reasonable. The use of "persons belonging to minorities" is correct in this context.

COMMENTS ON ARTICLE 6

Germany

[7 January 1991]
[English]

193. This provision is likely to modify the State obligations embodied in article 3 (2) and article 4 (1) and (2) and should therefore be deleted.

Norway

[14 December 1990]
[English]

194. The brackets containing article 6 of the draft text should be deleted.

Four Directions Council

[December 1990]
[English]

195. Article 6. We support the inclusion of this article in the final text of the declaration.

Minority Rights Group

[16 January 1991]
[English]

196. The article as a whole is worth supporting in its indication of State obligations towards minorities. One caveat relates to the phrase "depending on their specific conditions" as a starting-point for State action. Unless it is very unrealistic, international law must admit differences between States in wealth, resources, and ethnic and religious complexity, and account for it in its demands. Some States are clearly better equipped than others to act positively for minorities. Some relativity of standards is, therefore, inevitable. However, what international law demands is good faith in the assessment and fulfilment of obligations. Whatever formula is adopted to function for less advantaged States, it must not be allowed to function as pretext for inaction. The onus in this respect will fall upon whatever measures of implementation accompany the declaration.

COMMENTS ON ARTICLE 7

Germany

[7 January 1991]
[English]

197. The idea expressed in paragraph (a) is welcomed. However, it might be improved as follows in its second part, without any territorial reference:

> "... including participation in the affairs relating to the protection and promotion of the identity of such minorities."

United States of America

[27 December 1990]
[English]

198. If article 7 paragraph (a) is to be retained, the Government of the United States would prefer to see the final bracketed phrase be amended to provide "through national institutions and, where possible and appropriate, reginal institutions."

International Federation of Human Rights

[14 December 1990]
[French]

199. In article 7, paragraph (a), the square brackets around "through national institutions and, where possible, regional institutions" should be removed.

200. It must be remembered that the minority issue is not merely a question of the traditional "vertical" legal relationship between the State and the individual but also of the "horizontal" relationships of group to group, majority to minority or minority to minority. Some (generally religious or social) observances demanded by particular groups may also be contrary to public order as defined by the universally recognized instruments on basic rights.

201. Here the duties that are the corollary of acknowledged rights assume some prominence. The reconciliation of contradictory rights inherent in the practice of law takes on an additional dimension, requiring, in addition to a formal catalogue, regulatory institutions and bodies to make such rights compatible in practice. Such bodies should initially be established at the national level, in order to permit minorities to be represented, to take part, and to be associated with decisions not only affecting the regions in which they live but also enabling them to participate equitably in the affairs of State.

202. These proposals chime with the ideas presented by Mrs. Palley in document E/CN.4/Sub.2/1989/43, entitled "Possible ways and means to facilitate the peaceful and constructive resolution of situations involving racial, national, religious and linguistic minorities".

203. Mrs. Palley repeatedly points out the need for effective national institutions and emphasizes, in her "guiding principles", the importance of full popular participation. Paragraph 19, for example, states:

> The participation and co-operation of both minorities and majorities in designing institutions for the protection of their respective rights is likely to be an important factor in determining long-term success.

Four Directions Council

[2 December 1990]
[English]

204. Article 7 (a). As currently worded, this paragraph overlaps with article 3 (2). The important element, which should be stated more explicitly, is the right to take part in decisions affecting them particularly, on account of who they are or where they live. We would rephrase the paragraph as follows:

> (a) Persons belonging to minorities have the right to participate effectively in decisions particularly affecting them as minorities, or concerning the regions in which they live, and to exercise this right through national institutions and, where possible, through representative regional institutions.

205. This constitutes one of the most novel and important elements of the declaration, and is consistent with the growing recognition, in international fora, of the collective aspects of the right to participation in public affairs and economic decision making. See General Assembly resolution 44/211 (para. 6), UNDP Governing Council decision 90/18, the report of the Global Consultation on the Right to development as a Human Right (E/CN.4/1990/9/Rev.1), and the African Charter for Popular Participation in Development (E/ECA/CM.16/11, February 1990).

206. Article 7 (b). For clarity only, this paragraph should be reworded to end as follows: "with due regard for the legitimate interests of the minorities which may be affected".

International League for the Rights and Liberation of Peoples

[13 December 1990]
[French]

207. The stipulation that national policies and programmes, like programmes of international co-operation and assistance, should be planned and implemented with due regard for the legitimate interests of minorities (art. 7, para. (b)) is a worthwhile addition. It is also important to make it plain that United Nations bodies and specialized agencies must pay special attention to requests for co-operation and technical assistance in pursuit of the stated objectives of the draft declaration.

208. It would also be beneficial, however, for minorities to participate, through their representative institutions and non-governmental organizations, in the formulation of such programmes and the pursuit of such activities.

Minority Rights Group

[16 January 1991]
[English]

209. (a) If persons belonging to minorities have the rights to "respect for, and the promotion of" their identity (art. 1) they also have the right to "preserve" it. This part of article 7 thus appears redundant. However, the participation right is not redundant, and is discussed above in relation to article 3. Furthermore, the specific regional context of participation in article 7 is potentially very important for some groups: some, but not all minorities, form majorities in definable regions. The right to participate, in this context, is less than the explicit right to an autonomous administration, but incorporates some of its spirit. The "regional participation right" may lead in some cases to autonomy, in the light of the specific historical and territorial circumstances of the populations concerned. Much will depend upon local traditions, including the legal/constitutional tradition of the State. It is a matter of judgement whether autonomous administration (which may deflect claims to self-determination by groups dominant in part of a State's territory) is worth the allocation of a further, specific right or can be left as a matter of reasonable implication from the text reference to "regional institutions".

210. (b) This is unclear: whose "legitimate interests"? Subject to a revised sentence structure, the sense of (b) is positive. Presumably, the legitimate interests of the minority are primarily those set out in the Declaration. In this case, the phrase "legitimate interests" might be supplemented to read "their rights and legitimate interests".

MRG's recommendations on art. 7 (a)

211. MRG recommends the deletion of the words "[national], ethnic, religious or linguistic", and to insert the words "including participating in affairs relating to the protection and promotion of the identity of such minorities" after the words "in the affairs of the State".

COMMENTS ON ARTICLE 8

Minority Rights Group

[16 January 1991]
[English]

212. The text is succinct. It could, however, be appropriate to supplement it with a reference to the necessity/desirability of States co-operating with the United Nations in its efforts to support the principles of the declaration.

COMMENTS ON THE NEW ARTICLE

Minority Rights Group

[16 January 1991]
[English]

213. The "new article", which seeks to define the spirit of tolerance and friendship in which the declaration is to be carried out, unfortunately introduces new ambiguities into the text. The phrase "persons belonging to minorities" does not indicate what kind of minorities are included. Presumably, only the national, ethnic, religious or linguistic groups within the declaration are referred to. It would be better to repeat the basic description of the groups to make this clear. The article then tentatively includes the terms "all peoples" and "peoples" to denote the groups among which friendship, etc. is indicated. It is clear from general international law, the Charter of the United Nations, and, inter alia, the texts of the two United Nations Covenants on Human Rights, that "peoples" have the right of self-determination. However, the law distinguishes between a "people" and a "minority": minorities are not generally accorded any right to self-determination. In the context of a declaration on minority rights it is probably better to avoid "people", even though its proposed use in the new article does not ascribe any right. To insist on it could prejudice the support of States concerned about minority claims to self-determination and secession. The 1989 International Labour Organisation Convention (No. 169) on Indigenous and Tribal Peoples employs the term, but the text includes the disclaimer in article 1 (3) that: "The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law".

MRG's recommendations on the new article

214. MRG recommends the substitution of the word "minority" for the words "[national], racial, ethnic, religious and linguistic".

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Forty-seventh session
Agenda item 20

RIGHTS OF PERSONS BELONGING TO NATIONAL, ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES

Analytical compilation of the comments received in pursuance of paragraph 3 of Commission on Human Rights resolution 1990/45 on the rights of persons belonging to national, ethnic, religious and linguistic minorities

As of 1 February 1991, in addition to the comments contained in E/CN.4/1991/52, the Governments of the following States had also submitted their comments: Austria, Holy See, Italy and Malta.

As of the same date comments had also been received from a specialized agency: UNESCO.

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I. GENERAL COMMENTS

A. Austria

[18 January 1991]
[English]

1. Austria has consistently supported initiatives of standard setting in the field of human rights related to the protection of minorities because it considers it important to enable minorities to participate effectively in the affairs of the State in which they live rather than to marginalize them or deny their existence.

2. Ethnic groups or minorities are a cultural enrichment of States in which they live and constitute a valuable link between neighbouring States. They must be entitled to unhampered relations with the population of the same language or culture in other States. Minorities should have the right to be recognized as such as well as to the preservation, development and advancement of their ethnic and cultural identity. This right goes beyond mere protection against against discrimination. They also should have the right to organize themselves and to have an adequate percentage of public means.

3. Members of ethnic groups or minorities must be entitled to use their own language in private and in public, including the use of their language before public authorities which are specifically related to the area in which they live.

4. The definition of rights of ethnic groups calls for a continuous dialogue with their representatives. An understanding of questions concerning minorities or ethnic groups has to be promoted among the majority population.

5. Everyone should have the right to adhere freely to an ethnic group or minority. No member of an ethnic group or minority should encounter disadvantages of his exercise or non-exercise of the rights pertaining to him as a member of such a group.

6. It would therefore be an important enhancement of the protection of human rights within the framework of the United Nations if Member States could consider adopting principles of protection on minorities on a world-wide basis. In the opinion of the Austrian Government the draft declaration on the rights of persons belonging to national or ethnic, religious or linguistic minorities is a step in the right direction.

7. With reference to the text of the draft declaration as contained in document E/CN.4/1990/41, annex I, it would be important to include a definition of the term "minority". In spite of past difficulties in agreeing on a definition of this term, Austria proposes the following version:

> "The term minority means a group, traditionally living in a State, which is smaller in number than the rest of the population of a State, whose members, although nationals of that State, have ethnic, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language."

8. Austria will present specific comments on various parts of this draft declaration at the forthcoming second reading during the forty-seventh session of the Commission on Human Rights.

B. Holy See

[22 January 1991]
[French]

9. One substantive issue that is still outstanding and has not been tackled in the draft is the definition of the concept of minority. Are the rights in question possessed by the persons belonging to minorities or by the minorities themselves? The fact that the authors of the draft have used both approaches in the text - and that they are repeated side by side in almost all the articles except (surprisingly enough) in the title - suggests that the two concepts are different. In any case, it should be noted that article 27 of the International Covenant on Civil and Political Rights recognizes only certain rights of persons belonging to ethnic, religious or linguistic minorities (no mention being made of national minorities). The Holy See would point out that the existence of the rights of minorities, which are regarded as enjoying collectively rights is clearly asserted in the official teachings of the Church (see Pacem in Terris, Third Part; Gaudium et Spes, N. 73; Message for World Peace Day, 1989, N. 4-8).

C. Italy

[25 January 1991]
[French]

10. The draft declaration on the rights of persons belonging to national, ethnic, religious or linguistic minorities, prepared by the Working Group established by the Commission on Human Rights (E/CN.4/1990/41 of 5 March 1990) is, on the whole appropriate and balanced. However, the Government of Italy considers that the present text could be further improved.

11. Above all, the range of rights recognized should be extended. Useful terms of reference can be found in the document (fourth part) of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE.

12. In Italy's opinion minorities as such possess collective rights and persons belonging to those minorities enjoy individual rights. A way should therefore be found to make that distinction in the text of the declaration with a view, inter alia to future codification on the basis of the declaration. This applies above all to the title of the declaration, which at present mentions only the individual rights of persons belonging to minorities. The same is true of the preamble. Regarding the two options proposed for article 1, Italy prefers the wording in which "the minorities" are the subject; it has the same preference, mutatis mutandis, in the case of article 2.

D. Malta

[17 January 1991]
[English]

13. In compliance with the Secretary-General's invitation for the submission of comments to resolution 1990/45 and the draft declaration, the Permanent Mission of Malta wishes to state that Malta does not have any specific minorities to which the said declaration would apply. However, Malta has extensive human rights provisions both in its Constitution and in Act XIV of 1987. Furthermore, Section 45 of the Constitution of Malta, referring to discrimination, is a comprehensive section indeed and the rights being referred to in the draft declaration are substantially covered.

E. UNESCO

[17 January 1991]
[French]

14. In the context of UNESCO's activities in this area, steps are being taken to explore the possibility of drafting an instrument (declaration or recommendation) on the cultural rights of minorities to complement this draft declaration. A meeting on the cultural rights of peoples in Europe will be held in Gerona, Spain, from 5 to 8 February 1991 for this purpose.

II. COMMENTS ON THE PREAMBLE

[22 January 1991]
[French]

A. Holy See

15. On the positive side, it may be noted that the preamble emphasizes the importance of respect for human rights, contains a timely reminder of the worth of the human person and the equality of nations (second paragraph) and an unequivocal reference to religious freedom (art. 3 para. 1) and, on the whole, endeavours where possible to increase the protection of the minority groups which have often been the victims of abuses that have resulted in genocide.

16. Some reservations, however, are in order. First of all, there are a number of terminological inconsistencies: whereas resolution 1990/45 of the Commission on Human Rights refers to "national, ethnic, religious and linguistic minorities", the title of the draft speaks of "national or ethnic, religious or linguistic minorities"; whereas preambular paragraph 4 refers to "ethnic, religious or linguistic minorities", preambular paragraph 5 adds the adjective "national" between square brackets before "ethnic". This variation is repeated through the remainder of the text and gives the impression that the authors of the draft have not yet resolved the difficulties inherent in the definition of the concept of minority. These difficulties have plagued them from the beginning of their work several years ago and it would appear that failure to deal with them has not helped to improve the accuracy of the draft's present wording, especially since paragraph 2 of the above-mentioned resolution requests the United Nations Secretariat to ensure "uniformity of terminology".

17. Preambular paragraph 7 appears somewhat vague: the meaning of the statement that minorities "are within the constitutional framework" is not very clear and it is not obvious that "the constant promotion and realization of the rights of persons belonging to minorities" will contribute to the "strengthening of friendship and co-operation among peoples and States".

B. UNESCO

[17 January 1991]
[French]

18. In the third preambular paragraph, it would be useful to refer to the Convention against Discrimination in Education adopted by UNESCO's General Conference at its eleventh session in Paris, on 14 December 1960.

III. COMMENTS ON ARTICLE 2

A. Holy See

[22 January 1991]
[French]

19. The wording of article 2, paragraph 1, could give rise to problems of interpretation in respect of religious freedom; the word "propaganda" as used therein appears to encompass any activities that threaten the existence or the identity of minorities (according to the words in square brackets which increase the ambivalence and at the same time, make it more vague). The commendable intention of the authors to strengthen protection is understandable and appreciated but it is a source of concern that a Government might regard even the evangelizing activities of the Church as "propaganda". In that case, article 2, paragraph 2, would authorize the Government to combat such activities.

B. Malta

[17 January 1991]
[English]

20. Article 2, paragraph 1: Retention of the words in brackets, both after the word "instruments" and after the word "propaganda".

21. Article 2, paragraph 1 (ii): Retention of the first part of paragraph 1 (ii) but deletion of the words "or the development of their own characteristics".

22. Article 2, paragraph 2: Retention of the words in brackets "and in accordance with the relevant international treaties to which they are parties".

IV. COMMENTS ON ARTICLE 3

A. Holy See

[22 January 1991]
[French]

23. Although article 3, paragraph 2, provides for the right of minorities "to participate on an equitable basis in the cultural, religious, social, economic and political life in the country where they live", it gives the impression that it is referring to countries which have a "State religion"; however, to cite a specific example, what does participating "on an equitable basis" in the religious life of a country mean for a Christian minority living in an Islamic country? (The adverbial phrase is rather unclear in this context).

B. Malta

[17 January 1991]
[English]

24. Article 3, paragraph 3: Deletion of the words in brackets "This right shall be exercised in accordance with national legislation and relevant international human rights instruments".

V. COMMENTS ON ARTICLE 4

A. Malta

[17 January 1991]
[English]

25. Article 4, paragraph 3: Deletion of the words in brackets "as well as to develop further friendly relations and co-operation among States in accordance with the Charter of the United Nations".

26. Retention of the words in brackets "as well as to develop further international co-operation in the spirit of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".

B. UNESCO

[17 January 1991]
[French]

27. Article 4: Mention should be made of the obligations deriving from article 13 of the International Covenant on Economic, Social and Cultural Rights.

VI. COMMENTS ON ARTICLE 5

A. Holy See

[22 January 1991]
[French]

28. Article 5, paragraph 2, appears superfluous and the reason for its inclusion is not very clear. Paragraph 3, on the contrary, reflects the concern of the countries which have large national minorities on their territory.

B. Italy

[25 January 1991]
[French]

29. A more comprehensive definition should be found for article 5, paragraph 1, in other words one that encompasses the process of the Conference on Security and Co-operation in Europe (CSCE) and the relevant documents that do not appear to be covered by the present definition, which refers only to "international treaties and agreements".

VII. COMMENTS ON ARTICLE 7

A. Italy

[25 January 1991]
[French]

30. Article 7 of the declaration refers to minorities with a territorial connotation, and it should be noted that a useful point of reference may be found in paragraph 36, subparagraph 2, of the Copenhagen document mentioned previously.

VIII. COMMENTS ON ARTICLE 8

A. Italy

[25 January 1991]
[French]

31. As regards the means of implementing the declaration, it may be pointed out that, on the one hand, the draft declaration fails to specify the functions of United Nations bodies (art. 8 of the draft) and, on the other, that it specifies, among the elements to be included a resolution accompanying the declaration (p. 14, para. (i)), the kinds of sensitizing activities to be undertaken by the Secretary-General as well as the monitoring to be carried out by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (p. 14, para. (ii)). The procedure laid down by Economic and Social Council resolution 1503 (XLVIII) concerning individual communications could, even if it was not explicitly mentioned, be included in article 8. It would be preferable, however, to include a specific reference to the possibility of submitting individual communications to initiate procedures for implementing the declaration.

IX. COMMENTS ON THE NEW ARTICLE

A. Italy

[25 January 1991]
[French]

32. The present wording of the new article of the draft declaration, the text of which is proposed on page 14 of document E/CN.4/1990/41, appears to weaken the declaration. Italy therefore suggests that it should either be strengthened or deleted.

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RIGHTS OF PERSONS BELONGING TO NATIONAL, ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES

Analytical compilation of the comments received in pursuance of paragraph 3 of Commission on Human Rights resolution 1990/45 on the rights of persons belonging to national, ethnic, religious and linguistic minorities

1. As of 18 February 1991, in addition to the comments contained in E/CN.4/1991/52 and Addendum 1, the following State had also submitted its comments: Ecuador.

Ecuador

2. The Ecuadorian Government's main comment on this subject is that it would be desirable to include in the draft declaration, either as article 5, paragraph 4, or as an additional paragraph in that article, the concept that is embodied in article 29, paragraph 1, of the Universal Declaration of Human Rights, to the effect that any person identified with a minority also has duties to the national community to which he belongs, because it is in that community alone that the free and full development of his personality is possible.

3. The addition of a paragraph of this nature is desirable because nowhere in the draft text is there any reference to reciprocal duty to the community in general, which is now required to provide special facilities to the minorities mentioned in the declaration, if necessary, by means of special legal provisions.